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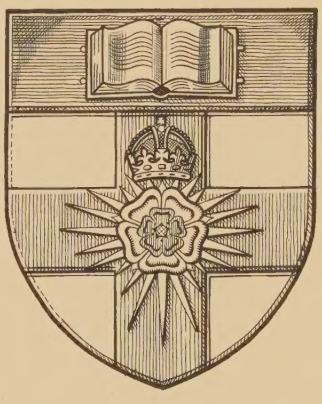

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THE

LAW REPORTS.

Under the Superintendence and Control of the
INCORPORATED COUNCIL OF LAW REPORTING FOR ENGLAND AND WALES.

Probate Division.

CASES DETERMINED IN THE

COURTS OF PROBATE AND DIVORCE,

IN THE

ADMIRALTY AND ECCLESIASTICAL COURTS,

AND ON APPEAL THEREFROM IN THE

PRIVY COUNCIL,

AND IN THE

COURT OF APPEAL.

EDITOR—J. R. BULWER, Q.C.

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JUDGES

OF

THE PROBATE, DIVORCE, AND ADMIRALTY DIVISION

OF

THE HIGH COURT OF JUSTICE.

XLVIII AND XLIX VICTORIÆ.

The Right Hon. Sir JAMES HANNEN, Knt., President.

The Hon. Sir CHARLES PARKER BUTT, Knt.

JUDGES

OF

THE COURT OF APPEAL.

XLVIII AND XLIX VICTORIÆ.

Lord SELBORNE, Lord Chancellor.

Lord COLERIDGE, Lord Chief Justice of England.

LORD ESHER, Master of the Rolls.

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} Ordinary Judges of Court of Appeal.

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Page	*Line*	*For*	*Read*
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1884

THE WILLIAM SYMINGTON.

The action was tried on the 24th of July, when the learned judge gave judgment for the defendants upholding their tender. The decree was drawn up in the following form:—"The judge having heard counsel on both sides pronounces the tender of 200*l.* hereinbefore made in this action to be sufficient, dismissed defendants and their bail from the action and all further observance of justice therein on payment of the costs incurred by the plaintiff up to the time of the said tender being made, and condemned the plaintiffs in the costs incurred subsequent to the said tender." Butt, J., having expressed a doubt at the time of giving judgment whether the practice of the Admiralty Court, whereby when a tender was upheld the plaintiff obtained the costs up to the date of the tender, was a proper one, the defendants now raised the question by a motion to vary the judgment.

Oct. 28. *Aspinall*, for the motion, argued that there should be no distinction between the practice as to the costs in this Division, and that in any other Division. When money is paid into court in the Queen's Bench Division and the plaintiff goes on with the action, the defendant, if he succeeds, is entitled to the whole costs: *Wheeler* v. *United Telephone Co.* (1) The plaintiff in fact forfeits his privilege if he does not take the money offered to him. Order LXV., rule 1, leaves the costs in the discretion of the Court, but such discretion should be governed by the general rule of practice in similar cases in other Divisions of the High Court.

Myburgh, Q.C., contrà, argued that the present practice had been settled by judicial decisions, *The Hickman* (2); *The Thracian* (3), and was a proper one. Next, it is not the invariable practice of the Queen's Bench Division to give the defendant all the costs in such cases. There are, on the contrary, decisions in favour of a practice similar to that of the Court of Admiralty: *Buckton* v *Higgs* (4), *Gretton* v. *Mees* (5), *Greaves* v. *Fleming* (6), and *Langridge* v. *Campbell.* (7)

Aspinall, in reply.

Cur. adv. vult.

(1) 13 Q. B. D. 597.
(2) Law Rep. 3 A. & E. 15.
(3) Law Rep. 3 A. & E. 504.
(4) 4 Ex. D. 174.
(5) 7 Ch. D. 839.
(6) 4 Q. B. D. 226.
(7) 2 Ex. D. 281.

1884

THE WILLIAM SYMINGTON.

Nov. 4. BUTT, J. This is a suit for salvage services rendered by the plaintiffs to the steamship *William Symington* on the 42th of May last. The action was begun on the 18th of June. In their statement of defence, delivered on the 12th of July the defendants denied that the services rendered by the plaintiffs were salvage services, and as an alternative defence paid into court the sum of 200*l.*, which sum the plaintiffs by their reply alleged to be insufficient. The cause was heard on the 24th of July, when the Court pronounced the sum paid in to be sufficient.

A question as to payment of costs has arisen. There is no doubt as to the liability of the plaintiffs to pay the defendants' costs incurred subsequently to the delivery of the statement of defence, but the plaintiffs claim to be entitled by the practice of the Court to be paid their costs up to that date.

No doubt the general practice of the Court of Admiralty was to give the plaintiffs their costs up to the time of payment into court, or of tender, as such payment into court was called. On the other hand the invariable practice of the Courts of Common Law was to give the defendants the whole costs of the cause where the only issue was the sufficiency of the amount paid into court, and where he succeeded on that issue.

Since the passing of the Judicature Acts these costs instead of necessarily following the event are, by Order LXV., rule 1, in the discretion of the Court or judge. I think it desirable that the practice of this Division with respect to costs should in the generality of actions be made to conform as nearly as may be to that of the Queen's Bench Division; and had there been no considerations specially applicable to salvage suits, I should have been disposed to have condemned the plaintiffs in the whole costs.

But there are circumstances which render it peculiarly difficult, if not impossible, for plaintiffs in salvage actions to form an estimate of the amount to which they are entitled for the services they have rendered. In the first place the amount of their remuneration depends to some extent on the value of the salved property, and of this they are seldom aware until after proceedings in the suit have gone some length. Again, from motives of public policy, and from the nature of the services rendered, their title to remuneration is not a mere quantum meruit.

1884

THE WILLIAM SYMINGTON.

Having regard to the weight my predecessors have attached to these considerations, and to the decision of the Court in the case of *Buckton* v. *Higgs* (1), where, as in this case, the defendant had pleaded payment into court as an alternative defence, I shall exercise the discretion vested in me by ordering the defendants to pay the plaintiff's costs up to the time of the delivery of the statement of defence. This, however, is a rule from which I should not hesitate to depart in any case in which I thought salvors had acted unreasonably in refusing an offer made before suit.

I wish to add that much confusion has arisen both in the Court of Admiralty and in this Division from a notion that no payment into court is sufficient unless it be accompanied by an offer to pay the plaintiff's costs up to that time. In my opinion, such an offer is not only unnecessary, but erroneous, and is one which should not be made.

Solicitors for plaintiffs: *Hollams, Son & Coward.*
Solicitors for defendants: *Fielder & Sumner.*

E. S. R.

Dec. 2.

THE MARION.

Co-ownership—Sale—24 *Vict. c.* 10, *s.* 8.

The Court will not exercise the power of sale conferred on it by 24 Vict. c. 10, s. 8 (2), by ordering the sale of a ship, unless a part owner—whether he be the owner of a minority or majority of shares—makes out a very strong case.

Continued and embittered disagreements between two part owners were held not to constitute sufficient reason for the interference of the Court.

MOTION on behalf of W. C. Lang, the owner of 22/64th shares in the ship *Marion* for the sale of the ship. The other co-owners were C. B. Forwood, who owned 38/64th shares, and one Nash, who owned the remaining 4/64th shares. An action of restraint

(1) 4 Ex. D. 174.

(2) Sect. 8. The High Court of Admiralty shall have jurisdiction to decide all questions arising between the co-owners or any of them touching the ownership, possession, employment and earnings of any ship registered at any port in England or Wales, or any share thereof, and may settle all accounts outstanding and unsettled between the parties in relation thereto: and may direct the said ship or any share thereof to be sold, and may make such order in the premises as to it may seem meet.

had been commenced by Lang against the other two owners, and by order of the district registrar at Liverpool the plaintiff's shares had been appraised. Forwood had for some time been the managing owner of the *Marion*, but he and Lang were entirely unable to agree as owners of the *Marion* in regard to the employment and management of the vessel, and Lang had been a loser by her. There had been litigation in regard to the *Marion* between them previous to the commencement of the present action, in which the *Marion* was arrested on the 23rd of September. Each party was willing to buy the shares of the other at the appraised value, but neither would come to terms. The plaintiff therefore gave notice of this motion for an order for the sale of the entire ship under 24 Vict. c. 10, s. 8, and the defendant gave a counter notice of motion for the sale of the plaintiff's shares.

Bucknill, for the plaintiff, argued that as the parties were at a complete deadlock, the proper solution of the difficulty was for the Court to exercise the statutory power and order a sale of the ship, and apportion the proceeds between the part owners. He relied on *The Nelly Schneider*. (1)

Myburgh, Q.C., for the defendant, argued that the circumstances of the case would not justify the Court in ordering a sale of the ship. The plaintiff could sell his shares in the market.

BUTT, J. I shall not order the sale of this ship. A part owner who may always sell his own shares in a ship, must make out a very strong case to induce the Court to make an order for the sale of the whole ship, by which his co-owners are forced to part with their property whether they like it or not. I think that no such case is made out here.

Counsel for the defendant then mentioned the counter motion, but on an intimation from the Court that it was governed by the decision just given, it was not further pressed.

Solicitors for plaintiff: *W. W. Wynne & Son.*

Solicitors for defendants: *Pritchard & Sons.*

(1) 3 P. D. 152.

1884
Dec. 6.

[IN THE COURT OF APPEAL.]

THE DORDOGNE.

Sailing Rules—Collision—Fog—Regulations for Preventing Collisions at Sea—Arts. 13, 18.

A steamship the *D.* in a dense fog off Ushant proceeding at slow speed heard a whistle about three points on her starboard bow, the whistle was repeated several times and answered by the *D.* In about a quarter of an hour from the first sound of the whistle the steamship *E.* appeared about a length from the *D.* crossing from starboard to port. The engines of the *D.* were reversed full speed but a collision occurred. Butt, J., having held both ships to blame the owners of the *D.* appealed.

Held, by the Court of Appeal (affirming the decision of Butt, J.), that the *D.* was also to blame, for she should have been brought to as complete a standstill as possible, without getting out of command, at an early period after the first sound of the whistle, and should have also stopped and reversed sooner.

Per Brett, M.R.: Under art. 13 (1) "a moderate speed"—in a river or narrow channel—means that a vessel shall be brought nearly to a standstill, whether the whistle or fog-horn of another vessel is heard or not, but in the open sea the article need not be so strictly construed, unless a whistle or fog-horn is heard.

Under art. 18 (2) as soon as it is perceived by those on a steamer in a dense fog that a vessel is coming substantially nearer, the steamer should stop and reverse.

Semble, though art. 18 does not apply to a sailing ship, yet she ought in similar circumstances to take off sail so as to come to as complete a standstill as possible, without getting out of command.

Appeal by the owners of the steamship *Dordogne* from a decision of Butt, J., delivered on the 23rd of November, 1883, whereby he held the steamships *Edith* and *Dordogne* both to be to blame for a collision which occurred between them about 5.30 A.M. on the 26th of August, 1883, about ten miles off Ushant in a dense fog. According to the evidence of the master of the *Dordogne*, about midnight, the *Dordogne* got into a fog; about 1 A.M. her speed was reduced to half speed, her full speed being about nine and a half knots per hour, and at 3.15 the fog having

(1) Art. 13: Every ship whether a sailing ship or steam ship shall in fog, mist, or falling snow, go at a moderate speed.

(2) Art. 18: Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary.

become more dense speed was reduced to slow. About 5.30 A.M. the master of the *Dordogne*, who was in charge of his ship, heard a whistle about three points on his starboard bow. On hearing it the engines were stopped, the *Edith's* whistle was again heard broader on the starboard bow and was replied to and the engines again set ahead. The engines were again stopped and again moved ahead. The *Dordogne* was stopped a third time, and then the *Edith* appeared crossing the bows of the *Dordogne* from starboard to port about a ship's length away. The master ordered the *Dordogne's* helm hard a port and her engines full speed astern, but she struck the *Edith* on her port side nearly amidships and sank her. The whistle of the *Edith* was heard several times from the first sound to the collision, the time being about a quarter of an hour. According to the engine-room log the engines of the *Dordogne* were going ahead at the moment the *Edith* was first seen and were not stopped until that time. The following was the judgment of Butt, J., so far as it relates to the case of the appellants.

BUTT, J. Now let us look at the *Dordogne's* story. There are reasons, apart from the nature and the severity of the blow, for mistrusting the story told by the witnesses of the *Dordogne*.

What is the evidence of her master? He says that some time before the collision her engines had been reduced to dead slow, and that meant that she was going through the water at from three and a half to four knots an hour.

I do not quite understand why she could not go slower than that, it may be what they call dead slow, but certainly they can go slower. Compare this statement with their pleadings.

The advisers of the *Dordogne* do not seem to have thought that easing the engines down to three and a half or four knots would be altogether satisfactory, because, they plead in the second paragraph of their statement of defence:—"The *Dordogne*, with her engines at dead slow, was heading N. half E. and was making about one knot or one and a half knots an hour."

I should have read that to mean that it was the speed at which she went at dead slow. It turns out that a statement very different was meant. It is meant that her dead slow speed was

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not such as she has described in that article, but that by reason of stopping two or three times, she had reduced her dead slow to that speed. Further, her master says, and here is a very material matter, that the *Dordogne's* engines were stopped, I am not quite clear whether he said two or three minutes, or three or four minutes before the *Edith* was seen.

Now we have the engineer's log produced, and that directly negatives the assertion. According to that log it is clear, if it be trustworthy, that the engines were not stopped, but were going at the moment the *Edith* was first seen. Then they say, that is a mistake. Well, of course, mistakes may occur in a log, as well as in anything else.

One has to consider what is the probability. I must say I was struck with the 12th article of the preliminary act, which is this:—"Immediately on sighting the *Edith* stopped engines." What does this mean? That until the moment of sighting the *Edith* they were going ahead. That corroborates the log, and tends further to contradict the master's evidence. It is not unlikely that that is taken from the log, and it may be a mistake, but then, there comes the one other thing which we think conclusive in this matter. We think it clearly established that the *Dordogne* struck the *Edith* a very heavy blow, and cut into her, I won't say whether it was thirteen or fourteen feet, but cut into her to a very considerable distance, and that that cut could not have been so severe as it was unless, at the moment it was made the *Dordogne* had considerably more headway than one knot or one and a half, which is all her captain allows her.

We think both of these vessels ought to have brought themselves to a standstill, or much nearer to a standstill, not at the first sounding of the steam-whistles, but within some time during those ten or fifteen minutes that they were approaching one another.

I know it is always said (I have argued it more than once myself) that the captain of a steamboat does not like to take all the way off his vessel, especially in a fog, and so lose command of her, because if he finds himself being run into by something else, he cannot move one way or the other.

There is some sense in the argument, and it is one which has

been considered, and I dare say will have to be considered again. I only intimate now my own opinion, which is this, that if instead of giving way to that feeling of dislike of getting their vessels out of command, the captains of steamers would, where danger is apparent, in a fog, at once take the way off them, in the aggregate we should have much less mischief than actually occurs.

It appears to me that the cases of *The Frankland* v. *The Kestrel* (1), and of *The Kirby Hall* (2) apply. I think both vessels in this case came within the passage which I am about to read from the judgment of the Privy Council in the case *The Frankland* v. *The Kestrel.* (1)

"The finding of the Court" (that is of the Court below) upon the question of negligence, is in these terms: "Both vessels were going, in truth, in the most absolute uncertainty as to the proceedings of the other, and in such a state of circumstances I have had to ask myself this question—Could anything have been done to avoid this collision which was not done? And the opinion of the Court, fortified by that of its nautical assessors, is, that on hearing the whistles of each other so near, and approaching each other, each vessel ought, not only to have stopped, but to have reversed until its way was stopped, when it could have hailed and ascertained with certainty which way the head of the other vessel was, and which way she was proceeding, and by that means the collision would, or might have been avoided. And this being the opinion of the Court, it will enforce the application of art. 16 of the Rules and Regulations for Preventing Collisions at Sea, which it is always the object of this Court to see carried into due and proper execution, for the due and proper execution of that rule would tend very much to prevent both loss of life and property, of which there are so many melancholy instances every week in this Court."

That is the judgment of Sir Robert Phillimore. Then the Lords of the Privy Council go on. "Their Lordships entirely concur with the learned Judge of the Court of Admiralty, as to the importance of enforcing this rule."

The result is that both these ships must be pronounced to blame.

(1) Law Rep. 4 P. C. 529. (2) 8 P. D. 71.

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Dec. 6. The appeal was heard.

Cohen, Q.C., and *Phillimore*, for the appellants, argued that the *Dordogne* from the position of the whistle was justified in continuing at dead slow speed, and had not by so doing infringed art. 13. Further that by stopping and reversing as soon as the *Edith* came in sight she had complied with art. 18. They referred to *The Beryl* (1), *The Beta* (2), and *The John McIntyre.* (3)

Hall, Q.C., and *Powell*, for the respondents, were not called on.

BRETT, M.R. In cases where vessels, whether steamers or sailing vessels, find themselves in a fog, they must be held strictly to the Regulations for Preventing Collisions at Sea. As I said in *The Beryl* (1), the regulations are made not merely for the purpose of preventing collision, but of preventing danger of collision, and vessels must be judged, not by proof of what turned out to be the actual facts, but by what ought to have appeared to be the facts under the circumstances in which he was placed to an officer of reasonable care and skill. That the *Edith* was to blame for this collision is obvious, but the question is whether the *Dordogne* was also to blame. That question must be answered by what ought to have appeared to be the possibility of risk of collision to an officer of reasonable care and skill in charge of the *Dordogne*. Now the circumstances were that the fog was so dense that the officer could not see another vessel until she was a ship's length from his ship; in other words, the fog was so dense that it was impossible to see another ship until a collision was inevitable.

This case, it should be observed, is not like the case of a steamer going up or down a river or a narrow arm of the sea. There, whether vessels hear a whistle or not, they should contemplate the probability of meeting other vessels, and that in such a place vessels meeting would do so almost on the same line. Therefore, in the Thames, for example, before a whistle is heard, I think that a vessel in a dense fog should be brought as nearly as possible to a standstill, so as only to be just under command. But on the open sea, where the probabilities of actually meeting

(1) 9 P. D. 137. (2) 9 P. D. 134.
(3) 9 P. D. 135.

another ship are less, I do not think that the speed need be as moderate as if a vessel is navigating a narrow channel. When, however, a sailor at sea hears a whistle, he knows immediately that there is another vessel in his vicinity. Then the case becomes more like the case of a fog in a river. A good deal must depend in the case at sea upon the indications which are given by the whistling vessel, and these must depend on the whistling from her, for it appears to me impossible that a whistle sounded a mile and a half off can sound the same as a whistle heard at the distance of 100 yards.

Therefore, if a ship at sea, in a dense fog, hears a whistle which should indicate that the other vessel may be from a mile to a mile and a half away, she ought at once to reduce her speed to a moderate rate, though the moderation then would be very different from the moderation required when the other vessel came closer. But the present case is not to be determined by what was done when the first whistle was sounded. There were a succession of whistles, three, and very likely more. Now what must have been the effect of those whistles? We know now that the ships were approaching each other, but we have to judge of what ought to have been the conclusion or suspicion of the officer in charge of the *Dordogne*. What should that succession of whistles have told him? I have no doubt that where you have two ships in fact closing on each other, and where you have a succession of whistles, each whistle must shew you that the other whistle is coming nearer. It is said they might shew you that the vessel was coming in a particular direction towards you, that is that she was or was not getting broader on the bow. I think that it does not signify whether the other vessel is getting broader on the bow or not if the whistle shews that she is coming closer. Everybody knows that in dense fogs you cannot tell where exactly the other vessel is, but if she is coming nearer and nearer, and if you cannot tell the direction in which she is coming, is there or not, that which would lead a prudent officer to suppose that if he goes on as he was there will be danger? The moment the whistles shew him a vessel is really coming substantially nearer, he not being able to tell the direction in which she is coming, he ought to obey, not only art. 13, but he ought to obey art. 18, if he is on a steamer.

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Considering only art. 13 as the rule which he ought to obey: as the ship comes nearer and nearer, moderate speed becomes more moderate and more moderate. That which was moderate speed when the vessels were two or three miles apart, is not a moderate speed when the vessels are within a half a mile of each other; and as the vessels get nearer, he must bring his own to as complete a standstill as possible without putting her out of command, and if it is a steamer she must go at least dead slow, and if the other vessel is really coming at all near to him he ought to obey art. 18 and stop and reverse. To a sailing ship art. 18 does not apply, because she cannot stop and reverse, but she ought, if she is under full sail, to take sail off till she brings herself as nearly to a standstill as is possible whilst being under command. Now, let us see what the officer of the *Dordogne* ought to have concluded. Upon that point I have asked the following question of the gentlemen who assist us in this case: "Considering the way in which you find these vessels were in fact approaching each other, would each successive whistle tell the officer of the *Dordogne* that the other ship was approaching nearer and nearer to him?" They agree with the view I should have come to and say "Yes." If so this officer ought to have brought his ship to a standstill at an early period, and when she was coming nearer to him he ought to have stopped and reversed, and by the time the last whistle was sounded his engines ought to have been stopped and reversed, the order for which I think was only given when he saw the vessel. Therefore he broke art. 18. The learned Judge of the Admiralty Court relied upon another circumstance to shew that the *Dordogne* was going at a very considerable pace at the time of collision. It is only fair to state that upon this point I asked the assessors this question: "Does the severity of the injuries suffered by the *Edith* lead to any conclusion as to the speed of the *Dordogne* at the moment of collision?" I do not know what the advice of the Trinity Masters to the Judge of the Admiralty Court was, but I am bound to say that the gentlemen assisting us say the severity of the blow would not lead to any conclusion as to the speed of the *Dordogne* at the collision. Therefore, I do not rely upon this fact at all, but I rely upon the facts I have stated, and the rule I have stated, and I am of opinion

that in this case the *Dordogne* broke art. 13, by not going at a more moderate pace than she did sooner than she did; and I am further of opinion, which is of itself quite sufficient to decide this case, that she broke art. 18 in not reversing sooner than she did.

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COTTON, and LINDLEY, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Fielder & Sumner.*
Solicitors for respondents: *Ingledew, Ince & Colt.*

E. S. R.

THE FAIRPORT.

Nov. 25.

Wages—Misconduct—Mortgage.

A mortgagee took possession of a ship by putting a man on board and giving notice to the master. The latter, by order of the mortgagor, took the vessel to sea with the man in possession on board. In an action by the master for wages, and for compensation for wrongful dismissal, the registrar awarded him a sum as compensation, being the amount of wages payable for two months after the mortgagee took possession:—

Held, on appeal, that the master had been guilty of misconduct in taking the vessel to sea, and could not as against the mortgagee be properly awarded any sum as compensation for wrongful dismissal.

APPEAL from a decision of the registrar whereby he awarded a sum of 87*l.* 10*s.* to the plaintiff in respect of wages earned and for compensation for wrongful dismissal. The plaintiff was the master of the *Fairport*, and had brought an action in rem against the ship for his wages and disbursements. The defendant, who had intervened in the action, was the mortgagee in possession. The facts of the case were that the mortgagee took possession of the *Fairport* on the 6th of June at Gravesend, and placed a man on board, and gave notice to the plaintiff that he had taken possession as mortgagee. The plaintiff, however, by order of the mortgagor, on the 10th of June took the *Fairport* to sea with the man on board of her, and allowed the freight to be paid to the mortgagor, and it was not until the 23rd of June that the mortgagee was able to arrest the vessel at Newport in an action of mortgage and dismiss the master. The engagement of the master

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was for twelve months, from the 12th of May, 1884, and by his report the registrar awarded the plaintiff wages for three months, being about two months beyond the 6th of June. The greater part were as compensation for wrongful dismissal.

Bucknill, for the defendant, argued that the master was not entitled to any compensation for his dismissal. By taking the *Fairport* to sea without the orders of the mortgagee he had been guilty of misconduct, and had forfeited any wages or compensation for his dismissal which would have otherwise been due to him.

Barnes, for the plaintiff, argued that as the mortgagor, the actual owner of the ship, had given orders to the master he had not been guilty of such misconduct as would cause a forfeiture of his wages, and therefore was not entitled to any compensation for his dismissal.

Bucknill, in reply.

BUTT, J. In this case the order of the registrar will have the effect of taking from the mortgagee of this ship the sum awarded to the master in respect of compensation for his dismissal. The clear fact is that the mortgagee, as he had a right to do, took possession of this ship on the 6th of June, and that the plaintiff took the vessel to sea with the man in possession on board, so that the mortgagee could not in fact obtain possession for some time. This conduct on the part of the master clearly disentitles him to claim anything from the time at which the mortgagee became in legal possession of this vessel, for the plaintiff asks in effect to be paid by the mortgagee, although he has not obeyed him. The master is entitled to his wages for such time as he properly served the legal owner on board ship, but not to compensation for his dismissal.

Solicitor for plaintiff: *F. Bradley.*

Solicitors for defendant: *Ingledew, Ince, & Colt.*

E. S. R.

THE ROBERT DICKINSON.

1884
Dec. 17.

Restraint—Bail Bond—Form.

In an action of restraint the bail bond should not be given to pay what may be adjudged against the defendant in an action, but simply for the appraised or agreed value of the plaintiff's shares, in case the ship does not return to the particular port named in the bond.

MOTION, by special leave of the Court, to set aside or discharge an order of Butt, J., made on the 9th of December, whereby he dismissed an application by the defendants to condemn the plaintiffs in damages and costs for the entry of a caveat release, and refused to order the release of the ship *Robert Dickinson* on the defendants filing a bail bond already executed.

The motion arose out of the following circumstances:—An action of restraint was commenced by Robert Dixon and others, the owners of 22/64th shares in the *Robert Dickinson*. By the writ in this action they claimed from the remaining owners of this vessel a bond in the value of their shares, and for the safe return of this vessel, in the sum of 15,000*l*. On the 28th of November the registrar made an order that bail should be given for 6500*l*., and on the 1st of December two sureties entered into a bail bond in the form used in the Admiralty Registry both in actions of restraint and in all other actions. The bond tendered by the defendants was, omitting formal parts, in the following words (1): "Now therefore we (. . . .) hereby jointly and severally submit ourselves to the jurisdiction of the said Court, and consent that if E. J. W., &c., the defendants in this action, shall not pay what may be adjudged against them in the said action, with costs, execution may issue forth against us, our heirs, &c., for a sum not exceeding £——." On the 2nd of December a caveat release to prevent the release of the ship was entered by the plaintiffs, who refused to accept the said bond on the ground that it was not in proper form. On the 9th of December Butt, J., at the hearing of a summons by the defen-

(1) This was Form No. 24, in the Forms appended to the Rules of the High Court of Admiralty, 1859.

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dants to condemn the plaintiffs in damages and costs for the entry of this caveat, decided that the form of bond was wrong, as it should not have been to pay a sum adjudged to be due in an action, and dismissed the application. The present motion was in the nature of a rehearing, permission being granted by Butt, J., for the case to be argued before him in Court.

The plaintiffs had given notice of a summons that the form of bond be settled by the Court. This was given because, after the above decision in chambers, the plaintiffs sent the defendants' solicitor a bond in the form in which they considered it should be executed, which was in its turn objected to by the defendants. This summons was adjourned into court for hearing with the defendants' motion. The plaintiffs' bond was in the following form: "Now, therefore, we .... hereby jointly and severally submit ourselves to the jurisdiction of the said Court, and consent that if the said defendants or we the said —— shall not in the event of the said ss. or vessel —— not safely returning to the port of Newcastle, *or in the event of the said ss. or vessel incurring liabilities prior to the safe return as aforesaid,* pay to the plaintiffs or their solicitors, Messrs...., the sum of 3000*l.*, *the appraisement value of the plaintiffs' shares in the said ss. or vessel, or any sum or sums she may become liable to pay in respect of such liabilities as aforesaid, and the costs of this action,* execution may issue forth against us, our heirs, executors, and administrators, lands, goods, and chattels, for a sum not exceeding 3000*l.*" The words in italics in the above bond were objected to by the defendants.

Phillimore (*Bucknill*, with him), for the defendants in the motion, argued that though there was a special form of bond before 1859: see *The Apollo* (1), *The Margaret* (2), for actions of restraint, yet, since the Admiralty Court Rules of 1859, the bond had been the same in all actions, the material words being, to pay what might be adjudged due in the action. This was stated in Pritchard's Digest, 2nd ed., p. 651. This practice, as formulated by the Rules of the High Court of Admiralty, 1859, Nos. 39, 40, and 41, is preserved by Order LXXII. of the Judicature Rules, 1883. The practice as to mandamus, which is analogous,

(1) 1 Hagg. 306. (2) 2 Hagg. 275.

as being outside the directions of the Judicature Rules, has been preserved by this order: *Reg.* v. *Justices of Pirehill North.* (1)

Bruce, Q.C., and *Raikes*, for the plaintiffs, were not called on.

BUTT, J. I adhere to the opinion which I pronounced in chambers. The form of bond tendered by the defendants was one under the Rules of the High Court of Admiralty, 1859. But rule 186 (2) says the forms are to be followed as far as circumstances will allow. This action is simply one of restraint, and there is no prayer in the writ that the Court will award any sum of money to the plaintiffs. Therefore, the form in question is inapplicable to actions of restraint, and, having regard to rule 186, ought never, in cases of restraint, to have been employed in the registry. The motion must be dismissed with costs.

The plaintiffs' adjourned summons then came on for hearing.

Phillimore, for the defendants. The question is whether the bond as settled by the plaintiffs or as altered by us is the proper form.

THE COURT called on counsel for the plaintiffs to support their additions to the bond for the safe return of the ship.

Bruce, Q.C., and *Raikes*, for the plaintiffs, argued that double the appraised value should be inserted in the bond, for unless this was done the plaintiffs would not get the net value of their shares. As to the additions objected to by the defendants, they were intended to guard against probable liabilities on the plaintiffs' shares.

[They referred to Clarke's Praxis, tit. 12; Abbott on Shipping, 5th ed. p. 496.]

BUTT, J. No authority has been cited to me to support any of these additions to the simple form of bond required in this case. All that the minority are entitled to is a bond in the value of

(1) 13 Q. B. D. 696, on appeal 14 Q. B. D. 13.

(2) Rule 186: The forms annexed to these rules, orders, and regulations shall be followed as nearly as the circumstances of each case will allow.

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their shares for the safe return of the ship to a particular port either as agreed between the parties or as appraised by the marshal: it has never been the practice to give a bond in double the value. If in this case the parties cannot agree on the values, the shares must be appraised in the ordinary way. Each side must pay their costs of this summons.

Solicitors for plaintiffs: *Pattison, Wigg, & Co.*
Solicitor for defendants: *H. C. Coote.*

E. S. R.

Jan. 12.

[IN THE COURT OF APPEAL.]

THE BEESWING.

Practice—Withdrawal of Appeal—Order LVIII., r. 6.

When a respondent under Order LVIII., rule 6, has given notice that he will on the hearing of an appeal contend that the decision of the Court below should be varied, and the appellant subsequently withdraws his appeal, such notice entitles the respondent to elect whether to continue or withdraw his cross-appeal. If he continues his cross-appeal the appellant has the right to give a cross notice that he will bring forward his original contention on the hearing of the respondent's appeal.

MOTION on behalf of the defendants in an action brought by G. Parr, late master of the steamship *Beeswing*, against her owners for wages and disbursements. The action was heard on the 11th and 12th of August, 1884, and Butt, J., delivered judgment partly in favour of the plaintiff. The plaintiff gave notice of appeal on the 30th of August to vary the judgment of Butt, J. On the 18th of November the defendants under Order LVIII., rule 6, gave notice that upon the hearing of the plaintiff's appeal they would contend that the judgment of Butt, J., should be reversed, so far as he had pronounced in favour of the plaintiff's claim. On the 27th of November the plaintiff gave notice to the defendants of the discontinuance of his appeal, and filed a notice to this effect in the Admiralty Registry. The defendants desiring to continue their cross-appeal, requested the official whose duty it is to set down causes to regard the notice of contention given by them as a cross-appeal so as to avoid the need for beginning fresh appeal proceedings on their behalf. He did not consider he had power

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to do this, and therefore the defendants gave notice of motion to the Court of Appeal that "the notice of contention given by the defendants pursuant to rule 6 of Order LVIII. of the Rules of the Supreme Court, 1883, on the 18th day of November, 1884, may take the place in the list of appeals of the appeal of the plaintiff, notice of which was given on the 30th of August, 1884."

J. G. Alexander, for the motion, argued that the notice allowed by Order LVIII., rule 6, was equivalent to a cross appeal, and therefore should remain in force even if the appellant withdrew his appeal.

W. R. Kennedy, for the appellant, argued that he would be prejudiced by this course.

Cur. adv. vult.

BRETT, M.R. I have consulted with the members of the other division of the Court of Appeal in regard to the point raised in this case, in order that the practice may be settled. We think that in such cases as this, whether the appeal be interlocutory or final, the cross notice which the respondent may give under Order LVIII., rule 6, should be treated as a cross-appeal to the extent that on the original notice of appeal being withdrawn by the appellant, the respondent should have the right to elect whether to persevere with or to withdraw the cross-appeal. If the respondents elect to adopt the former course, then the appellant shall have the right to give a cross notice stating that he intends to bring forward the subject matter of his original notice of appeal on the hearing of the respondents' appeal. In the present case the respondents may have three days to elect whether under the circumstances they will adhere to their application, and if so, the costs of this motion shall be costs in the appeal.

Solicitors for appellant: *Venn & Co.*

Solicitors for respondents: *Harper & Batcock.*

E. S. R.

1885
Jan. 7.

[IN THE ARCHES COURT OF CANTERBURY.]

THE OFFICE OF THE JUDGE PROMOTED BY THE BISHOP OF SALISBURY *v.* OTTLEY.

Practice—Particulars—Criminal Suit.

In a criminal suit containing charges of misconduct against a clerk in holy orders, an order was made after the close of the pleadings that the promoter should give particulars of the charges.

Such particulars should as a rule be applied for on the admission of articles.

MOTION by the respondent that the promoter be ordered to give particulars of the charges set out in the articles. The suit was one founded on criminal charges, and at the time of this application the pleadings had closed.

Jeune, for the motion. In a case of this nature the respondent should have particulars of the charges alleged against him. The common law practice has been followed in a previous case: *Martin* v. *Roberts*. (1)

G. O. Moore, for the promoter. The application should have been made on admission of articles. In *Martin* v. *Roberts* (1) the respondent had objected to the admission of the articles on the ground that they were not sufficiently specific, and his Lordship ordered the delivery of particulars instead of amending the articles; but in the present case the respondent has given notice that he does not oppose the admission of articles, and has allowed the pleadings to close before making his application.

LORD PENZANCE. As this is a criminal suit, with grave charges of misconduct against the respondent, I will allow the order to go for particulars, that the respondent may not be embarrassed in his defence. But as the application should have been made on the admission of articles, the respondent must pay the costs of this application. The old practice must be adhered to until some new rule is made by the Court.

Subsequently, upon the application of the respondent, Lord Penzance allowed the question of costs to be reserved.

Proctors for promoter: *Moore & Currey.*

Solicitors for respondent: *Lovell, Son, & Pitfield.*

(1) July 18, 1876, unreported.

E. S. R.

THE PALERMO.

1884
Dec. 10.

Limitation of Liability—Foreign Ship—Crew Space—Merchant Shipping Act, 1854 (17 & 18 *Vict. c.* 104), *s.* 21—*Merchant Shipping Act*, 1867 (30 & 31 *Vict. c.* 124), *s.* 9.

The owners of a foreign ship with a closed-in space on the upper deck solely appropriated to the berthing of the crew, are entitled, in limiting their liability, to deduct such space under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, though the provisions of the Merchant Shipping Act, 1867, s. 9, have not been complied with.

The Franconia (3 P. D. 164) explained.

ACTION for limitation of liability by the owners of the German steamship *Palermo*. By paragraph 8 of the statement of claim the plaintiffs alleged that "the gross tonnage of the *Palermo* after due allowance in respect of closed-in spaces on the upper deck solely appropriated to the berthing of the crew was and is 1048·06 tons." By paragraph 9 the plaintiffs alleged that the sum of 8*l.* per ton on the gross tonnage of the *Palermo*, after deducting the aforesaid crew space, was 8384*l.* 9*s.* 8*d.*, and this amount they offered to pay into court or give bail for. The defendants denied, inter alia, paragraph 8 of the statement of claim, with a view to raise the question whether the plaintiffs were entitled to deduct the crew space.

The register of the *Palermo*, as verified by affidavit, shewed the following measurements:—

	Cubic metres.		British tons.
a. Space below measurement deck .	2877·6	=	1015·70
b. Space above measurement deck—			
one house . .	115·2	=	40·67
one forecastle . .	44·1	=	15·57
Gross capacity of the ship . .	3036·9	=	1071·94
Less			
1. Space for crew . . .	67·9	=	27·93
2. Engine, boiler and bunkers .	575·4	=	203·12
Net capacity	2393·6	=	840·89

The affidavit verifying this register also stated that the above-mentioned berthing space of the crew "consists and did consist at the time of the collision of permanently closed-in spaces on the upper deck solely appropriated to the berthing of the crew."

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THE PALERMO.

Bucknill, for the defendant, was called on to state his objections to the grant of the usual decree:—

The main point is that the plaintiffs have not complied with 30 & 31 Vict. c. 124, s. 9, subs. 5 (1), by having cut on a beam the number of men the crew space will accommodate, therefore the crew space cannot be deducted. It was decided in *The Franconia* (2) that the provisions of the Merchant Shipping Act, 1867 (30 & 31 Vict. c. 124), must be complied with. The Acts of 1854, 1862, and 1867 must be read together. Secondly, the affidavit does not set out with sufficient minuteness the number of decks which the vessel has.

[BUTT, J. The affidavit says that the crew space is on the upper deck; that is distinct enough.]

Stubbs, for the plaintiffs. The plaintiffs claim to deduct crew space on the upper deck under the Merchant Shipping Act, 1854 (17 & 18 Vict. c. 104), s. 21. (3) They do not claim under the

(1) 30 & 31 Vict. c. 124, s. 9: "The following rules shall be observed with respect to accommodation on board British ships; that is to say,—

"(1.) Every place in any ship occupied by seamen or apprentices, and appropriated to their use, shall have for every such seaman or apprentice a space of not less than seventy-two cubic feet, and of not less than twelve superficial feet, measured on the deck or floor of such place.

"(4.) Every such place shall [*provisions for inspection*] and thereupon such space shall be deducted from the register tonnage.

"(5.) No such deduction from tonnage as aforesaid shall be authorized unless there is permanently cut in a beam, and cut in or painted on or over the doorway or hatchway of every such place the number of men which it is constructed to accommodate, with the words, 'certified to accommodate —— seamen.'"

By 25 & 26 Vict. c. 63, s. 54, the tonnage of a foreign ship is to be ascertained by British measurement for the purpose of limiting the liability, and by s. 60 no measurement is required if the rules laid down in 17 & 18 Vict. c. 104 are in force in the country to which the ship belongs.

(2) 3 P. D. 164.

(3) Sect. 21: "The tonnage of every ship to be registered with the exceptions mentioned in the next section shall previously to her being registered be ascertained by the following rule, hereinafter called rule 1; and the tonnage of every ship to which such rule can be applied, whether she is about to be registered or not, shall be ascertained by the same rule.

Subs. 4: "If there be a break, a poop, or any other permanent closed-in space on the upper deck available for cargo or stores, or for the berthing or accommodation of passengers or crew, the tonnage of such space shall be ascertained as follows . . . . and shall be added to the tonnage under the tonnage deck, ascertained as aforesaid, subject to the following provisoes; first that nothing shall be added for a closed-in space solely appropriated to the berthing of the crew."

Act of 1867, which gave additional privileges to the shipowner, and therefore *The Franconia* (1) is not applicable.

Cur. adv. vult.

Dec. 10. BUTT, J. In this action for limitation of liability the question raised was, whether the plaintiffs were entitled in limiting their liability in respect of the damage caused by their ship the *Palermo*, to deduct certain spaces which were inclosed for the use of the crew from the registered tonnage. It was contended on behalf of the plaintiffs that the deduction of these spaces was properly made under the Merchant Shipping Act, 1854. On behalf of the defendants it was contended that in the case of *The Franconia* (1) the Court of Appeal had in effect held that the owner of a foreign ship was not entitled to make these deductions unless all the provisions of the Merchant Shipping Act, 1867, had been complied with. Having considered the case of *The Franconia* (1) I do not understand it to decide what was contended for by the defendants' counsel. It decided not that the German ship in that action was not entitled to deduct from the registered tonnage the spaces allotted to the crew which were inclosed and which were above the upper deck, that being the deduction contemplated by the Act of 1854, but that she was not entitled to further deductions provided by the more recent Act of 1867, unless she had in all respects complied with the requirements of that Act. In the present case Mr. Bucknill contended that the Act of 1867 was to be read as one with the Act of 1854, so as to make a decision on the one Act a decision on the other. I am not of that opinion; I think that the plaintiffs are quite entitled to the deductions under the Act of 1854; I therefore make the decree for which they ask.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *T. Cooper & Co.*

(1) 3 P. D. 164.

E. S. R.

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Dec. 12.

THE RHOSINA.

Damage — Harbour Master — Harbour Commissioners—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *ss.* 51, 52, 53—*Falmouth Harbour By-laws.*

The *R.*, which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour master, directed the master of the *R.* where to beach her. Before the *R.* left the outer harbour, S. came on board, although a Trinity House pilot was in the vessel, and when she had arrived near the place where she was to be beached gave directions as to the lowering of her anchor. The *R.* overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the Court found as a fact that there was negligence on the part of S., and that the place where the *R.* grounded was outside the jurisdiction of the harbour commissioners:—

Held, that the duties of the harbour master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed his functions as harbour master, and that he and the commissioners were therefore liable for the damage done to the *R.*

Held further, that S. was personally liable as a volunteer.

Action by the owners of the steamship *Rhosina* against the Falmouth Harbour Commissioners and one Sherris, their harbour master, personally, for damage to the *Rhosina* through the negligence of the defendants. The plaintiffs alleged that on the 29th of December, 1883, the *Rhosina* arrived at Falmouth, and anchored in the outer harbour; that on the 1st of January, 1884, the *Rhosina* entered the inner harbour under the orders, direction, and control of Sherris as such harbour master for the purpose of being beached on the hard in the inner harbour to ship a new propeller. They further alleged that the *Rhosina* proceeded up the inner harbour under the orders, direction, and control of Sherris as harbour master, and that on arriving near the hard he negligently and improperly ordered the *Rhosina's* starboard anchor to be let go, when it was improper and dangerous to do so; that the anchor was accordingly let go, and that the *Rhosina* grounded on her anchor and was thereby injured.

At the hearing there was a considerable conflict of evidence as to the spot on which the *Rhosina* grounded, the plaintiffs alleging that it was within the line limiting the jurisdiction of the harbour

commissioners, the defendants on the other hand alleging that the spot was outside their jurisdiction and within the property of the Falmouth Dock Company. It appeared from the evidence that on the night before the *Rhosina* was to be taken on the hard, the master of the *Rhosina* had some conversation on the subject with Sherris, who agreed to come on board the following morning. There was a conflict of evidence as to whether Sherris, who came on board early on the following morning, did so in his capacity of harbour master, or simply as a friend of the captain. It was admitted that the *Rhosina* was within the jurisdiction of the harbour commissioners when Sherris came on board, and that it was intended that she should be beached also within their jurisdiction. There was a Trinity House pilot on board at the same time; but Sherris gave the order to let go the anchor. There was a rule issued by the harbour commissioners that the harbour master should not board vessels, but give his directions from the deck of a steamer supplied for his use by the commissioners. The harbour commissioners were incorporated under the Falmouth Harbour Order, 1870, confirmed by the Pier and Harbour Orders Confirmation Act, 1870 (33 & 34 Vict. c. clviii.). The Harbours, Docks, and Pier Clauses Act, 1847 (10 & 11 Vict. c. 27), was incorporated with the same order, and by-laws had been made by the commissioners under their statutory powers. Those which referred to the duties of the harbour master were Nos. 3 and 4. (1)

Evidence was taken vivâ voce.

Webster, Q.C., Phillimore, and *Barnes,* for the plaintiffs, contended that the place where the accident occurred was within the jurisdiction of the harbour commissioners, but that even if it were

(1) "3. Every vessel which enters the harbour shall, so long as such vessel continues therein, be under the direction and control of the harbour master; and every pilot bringing a ship or vessel into the harbour, is to berth her under the directions of the harbour master, in such a position as will allow a clear passage for vessels entering or leaving the harbour. No vessel is to be anchored between the fairway buoys, nor to be moored in such a position as will interfere with the free access to any dock, wharf, or quay. No vessel is to be laid up between Trefusis Point and Green Bank Quay.

"4. Every vessel shall be moored or berthed at such part of the harbour, and shall from time to time be removed from place to place to such situation or situations within the harbour as the harbour master shall direct."

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not, that as the defendant Sherris was acting within the scope of his employment, the harbour commissioners were liable for his negligence. They referred to the Harbours, Docks, and Piers Clauses Act, 1847, ss. 51, 52, 53. (1) Sherris at any rate is personally liable, for even if he came only as a volunteer he is liable for gross negligence: *Wilson* v. *Brett*. (2)

Cohen, Q.C., and *Kennedy*, were for the defendants, the Falmouth Harbour Commissioners.

Bucknill, for the defendant Sherris.

There was no negligence on the part of the harbour master. Even if there were the commissioners are not liable, as it was no part of the duty of the harbour master to navigate the vessel, and there is no liability on the part of the commissioners for the negligence of the harbour master as a volunteer. [He referred to *Mills* v. *Holton*. (3)]

Phillimore, in reply.

SIR J. HANNEN (President). The first question of fact which I shall deal with is that of the place, but I do not attach the importance to it which has been given to it during the progress of the case.

So far as I have to deal with it as a matter of fact, I must say

(1) "51. The undertakers may appoint such harbour masters as they think necessary (including in such expression dock masters and pier masters as hereinbefore defined), and from time to time, as often as they think fit, may remove any such harbour master.

"52. The harbour master may give directions for all or any of the following purposes (that is to say):

"For regulating the time at which and the manner in which any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring, or unmooring, placing and removing whilst therein:

"For regulating the position in which any vessel shall take in or discharge its cargo, or any part thereof, or shall take in or land its passengers, or shall take in or deliver ballast within or on the harbour, dock, or pier.

"53. The master of every vessel within the harbour or dock, or at or near the pier, or within the prescribed limits, if any, shall regulate such vessel according to the directions of the harbour master, made in conformity with this and the special Act: and any master of a vessel who, after notice of any such direction by the harbour master served upon him, shall not forthwith regulate such vessel according to such direction, shall be liable to a penalty not exceeding twenty pounds."

(2) 11 M. & W. 113.

(3) 2 H. & N. 14.

that I have come to the conclusion that the place named by the captain of the vessel is not the correct place.

I am of opinion that the accident happened further eastward, and at the place mentioned by Mr. McKenzie, out of the jurisdiction of the commissioners. [The learned judge then examined the evidence on this point, and continued.] If anything does turn upon this point, that is my finding. But I am of opinion that so far as the evidence is concerned it is quite immaterial, if the harbour master was acting as harbour master. Supposing there had been no question of his being on board the vessel, supposing he had been in obedience to the rule laid down by the commissioners in his own steamer, and had said, "I require you to bring your ship to anchor at this spot," and the spot had happened to be just over the line where the dock authorities have jurisdiction, and supposing there had been wreck there upon which the vessel had gone in consequence of that direction of the harbour master that she should be brought to an anchor there. It seems to me to be impossible to argue that the commissioners would be entitled to say, we are not responsible because the order which he gave as harbour master, when carried out, actually brought the ship physically outside our jurisdiction. It would be by virtue of his order given as harbour master, and therefore I am of opinion that they would be liable.

Therefore the question is, was Sherris originally on board the vessel in his character of harbour master, or did he afterwards assume the duties of harbour master? Now, with regard to his first going on board the vessel, there is unfortunately a discrepancy in the evidence on the one side and on the other. The fact that he had already fixed the place where the vessel was to go tends to shew that he had, before he went on board the vessel, done that which properly belonged to his office of harbour master, and I think that he would have been strictly within his rights if he had left the matter there, and, after having said "I require you to beach your vessel at such and such a place," he had left it to the officers of the vessel and the pilot to navigate the vessel up to that spot, and to carry out the necessary manœuvres for beaching the vessel; and I am inclined to think that that was the position

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in which the harbour master originally was. I think that upon the whole he is to be believed when he states the way in which he came to be on board the vessel was not that he came in the ordinary course of his business as harbour master, but that his coming arose out of the difficulty as to whether a mud pilot or a Trinity pilot should be engaged; and I think further that, upon the whole, the evidence must be accepted that he did say that if he was well enough he would come down in the morning and give his assistance. There is unfortunately a discrepancy as to whether he added the words, that he would take upon himself no responsibility. In the view I take of the case it is not necessary for me to say absolutely whether he did add those words or not, but I am disposed to think that even if he used them it does not carry it further than the words that he had used before, and which I believe, namely, that if he was well enough he would come down and give his assistance. If he added the words that he would not be responsible, it would mean that he would not be responsible as harbour master, but that he was coming down to assist in bringing the vessel to this place. But even supposing that he said so—if he did in fact when on the vessel assume the duties of harbour master, then he would be liable. It does not appear that he used these expressions to which I have referred to the master of the vessel; it was only to Mr. Morgan, who was superintendent engineer, and came over from Cardiff. When he got on board the vessel, unfortunately that state of things arose which might be expected from a divided command. There was the master, and the pilot was there, but the harbour master appears to have given directions which were acted upon.

I entirely assent to the argument which has been addressed to me by Mr. Bucknill, and also by Mr. Cohen, that it is no part of the duty of the harbour master, as such, to navigate a vessel. It would be no part of his duty to say what sails should be set, and so on; but it is peculiarly a part of the duty of the harbour master to say what place, what moorings, a vessel shall take, what place in the harbour it shall occupy, and that applies, in my judgment, equally to the beaching as to the fastening of a vessel

at the buoys, or securing it by anchor in mid-harbour; because it is obvious that the place where a long vessel of this description is beached might interfere with the navigation in that part of the harbour. The harbour master being on board, appears to have gone forward, and he there gave a direction, the object of which was to fix the spot where the vessel was to be beached. It appears to me that in doing so he was acting as harbour master. That was a thing which he would, in any point of view, as harbour master have the right to control—where a vessel's anchor shall be dropped for the purpose of bringing her to a particular position, whether afloat or ashore.

In my judgment, therefore, he at any rate assumed, or resumed, shall I say, the functions of harbour master when on board the vessel in giving these directions, and if there be negligence in what he did, not only he, but his employers, the harbour commissioners, are liable.

With regard to the act done, that is of course a question solely for the Trinity Brethren, but in what I am about to say I have not merely acted upon the advice they give me, because it is their advice, but because I am convinced that it is sound.

In their judgment, and mine, what was done was grossly negligent, so grossly negligent that, even if the harbour master is to be regarded as a volunteer, I am of opinion that he would be personally liable. The cases which have been referred to sufficiently establish the principle that, if a man has a peculiar knowledge, and he offers his services to another person, he is liable for gross negligence whilst performing his undertaking. It is to be remembered that the harbour master said—I have no doubt truly—that he knew exactly the soundings all over this place, the soundings where he says the vessel ran ashore, as well as the place where, it was said on the other side, she took the ground, he was a person who, from his functions and from his special training, was fully capable, if he had used his knowledge and skill properly, of giving directions with regard to the beaching of this vessel. The instance of the surgeon has been mentioned. Let me give another case; suppose one coachman driving allows another coachman whom he thinks knows the road perfectly well

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to drive; he is a volunteer in that sense, and suppose he wishes to go at a greater speed than some other vehicle on the road, and in attempting to get past drives over a heap of stones and upsets the coach, he will not be excused by saying, "I was only a volunteer." But that is by the way, taking the view I do of the liability of the commissioners.

Now with regard to the act itself, the harbour master's statement is that what he intended to do by his order was to let the anchor drop so that its crown should just touch the ground, and so that it should drag or dredge, and by that means should assist (it has been argued) the action of the tug in getting the vessel's head round to starboard, where a tug was drawing it. But I am advised that the effect of dropping the anchor at that time, combined with the action of the tug, would be that the tug would draw the starboard bow of the vessel in the direction of and over the anchor, precisely the thing which occurred, so that the reason he gives for his manœuvre, in the judgment of those able to form an opinion, condemns him.

I am further advised, and it seems to me to be so, that the action of dropping an anchor at a time when it was known the vessel was smelling the ground, and in such a position that, as a matter of fact, as she went on she did come upon this anchor, was one which no person having reasonable skill would have had recourse to;—that is to say, using his reasonable skill; it is a delicate operation, the dropping of an anchor for the purpose of dredging, and so checking the progress of the vessel, and if resorted to at all, should be resorted to with the greatest care and safeguards, by giving directions so that there should be somebody ready to stop the chain at the critical moment.

Nothing of the kind was done, but the harbour master relied apparently upon his power, as he says, of stopping it exactly at the right moment.

The certainty of stopping a chain cable running out cannot be relied upon as a thing which can be done with such exactness that the moment the person giving the orders utters the word, he can rely upon its taking effect, precautions should be taken by warning the men to stand by and to be ready to carry out this

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particular manœuvre. But the harbour master took no steps of that kind, but says that he assumed that there would be somebody who would stop the running out of the cable when he ordered it to be done. I am advised that that was altogether a manœuvre which cannot be justified, and that the harbour master ought, as a reasonable man, to have foreseen that he increased the risk of that which did in fact happen, viz., of the vessel running on to the anchor.

For these reasons I am of opinion that the defendants are each and every of them liable.

Solicitors for plaintiffs: *Ingledew, Ince, & Colt.*

Solicitors for defendants: *Pritchard & Sons, for Genn & Nalder, Falmouth.*

E. S. R.

1885

Jan. 15.

THE EARL OF DUMFRIES.

Evidence—Engineer's Log.

In an action of damage the engineer's log is admissible as evidence against the shipowner by whom the engineer is employed.

ACTION for damage by collision. During the cross-examination of the second engineer of the defendants' ship, counsel for the plaintiff proposed to put in evidence the log kept by the first engineer for the purpose of contradicting the statements of the witness. It was objected on behalf of the defendants that the log was not admissible as evidence.

Phillimore (*Bucknill*, with him), for the plaintiffs. The engineer was the agent of the defendants for the purpose of making entries in his log. It is on this principle that the log kept by the mate is admissible as evidence against the owner. The same rule ought to apply to the engineer's log. *The Actæon* (1) lays down the principle that if a person is an agent to do a particular thing this makes an entry or admission by him evidence against his principal.

(1) 1 Spk. Ecc. & Ad. 176.

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THE EARL OF DUMFRIES.

Hall, Q.C. (*Kennedy*, with him), for the defendants. This evidence would not be admissible in the Queen's Bench Division; the engineer has no legal duty cast on him to make entries in his log; the official log is made evidence by statute, 17 & 18 Vict. c. 104, s. 285.

BUTT, J. I have considerable doubts upon this point; it is clear that this log is not evidence in favour of the owner of the vessel, but it is not clear that by the English law it is not admissible as evidence against him. I have so strong an opinion in favour of admitting this and similar documents that as there is no authority to the contrary, I shall allow it to be put in evidence.

The entry in the engineer's log was then read by the counsel for the plaintiffs.

Solicitors for plaintiffs: *T. Cooper & Co.*

Solicitors for defendants: *Stokes, Saunders, & Stokes.*

E. S. R.

[IN THE COURT OF APPEAL.]

1885
Jan. 13.

THE NEWBATTLE.

Foreign Government—Counter-claim—Security for Damages—24 Vict. c. 10, s. 34.

The Court has jurisdiction by 24 Vict. c. 10, s. 34, to order a plaintiff in an action for damage by collision to give security for damages to a defendant who brings a counter-claim. The Court can exercise this power when such plaintiff is a foreign sovereign whose ship cannot be arrested.

MOTION to rescind an order of the registrar made on the 21st of December, by which he ordered all proceedings in an action for damage by collision to be stayed until the plaintiffs gave security to answer the defendants' counter-claim.

The action was brought by the owners, master and crew of the *Louise Marie* against the *Newbattle*, the owners of which vessel had given bail. The *Louise Marie*, it was admitted, was the property of the King of the Belgians, and a public vessel of that government employed as a mail packet for mails, passengers, and merchandize between Dover and Ostend. The defendants counter-claimed, and on application to the registrar he made the order against which the plaintiffs appealed.

Aspinall, for the motion. The Court has no jurisdiction to make such an order, except in a cross action under the Admiralty Court Act, 1861, s. 34 (1), and this is not a cross action by the owners of the *Newbattle*, but a simple counter-claim. Further, as the Court has no jurisdiction to order the arrest of a vessel belonging to a foreign government, see *The Parlement Belge* (2), it ought not to make a foreign government give security for

(1) Sect. 34: "The High Court of Admiralty may on the application of the defendant in any cause of damage, and on his instituting a cross cause for the damage sustained by him in respect of the same collision, direct that the principal and the cross cause be heard at the same time and on the same evidence; and if in the principal cause the ship of the defendant has been arrested or security given by him to answer judgment, and in the cross cause the ship of the plaintiff cannot be arrested and security has not been given to answer judgment therein, the Court may, if it think fit, suspend the proceedings in the principal cause until security has been given to answer judgment in the cross cause."

(2) 5 P. D. 197.

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damages, which is equivalent to giving bail in lieu of or after the arrest of a vessel.

Barnes, for the defendants. The Admiralty Court Act, s. 34, applies to a counter-claim as much as to a simple cross action, they are in fact the same. It has been decided that a foreign government may be ordered to give security for costs: *The Republic of Costa Rica* v. *Erlanger* (1); therefore the Court has power to and should order security for damages to be given.

BUTT, J. I think that in this case there is no reason for interfering with the order of the registrar. It is said that the plaintiffs are a foreign government, this fact does not appear on affidavit, but it has been assumed during the argument, and I assume it now. The question then is whether a foreign government having voluntarily begun an action in this country and arrested the defendants' ship, is entitled to go on with its action without giving security to the defendants on their cross or counter-claim. The legislature has thought fit to provide that when for some reason the ship of the plaintiff cannot be arrested by the counter-claimant, security shall be given by the former, so as to insure payment of any sum which the latter may recover. On the assumption which I have already mentioned the *Louise Marie* cannot be arrested, so that the case falls within s. 34 of the Admiralty Court Act, 1861. Mr. Aspinall contended that though this case was within the words of that section it was not within the intention of it, but I think that it is within both the wording and the intention. (2) It has, however, been further contended that even so, a foreign government being plaintiff, and the matter being in the discretion of the Court, it should not order security to be given. But there is authority from the other Divisions of the High Court to shew that the practice has been to oblige foreign governments to give security for costs. By parity of reasoning I see no reason why a foreign government should not be ordered to give security for damages. This motion must therefore be dismissed with costs.

Jan. 21. The plaintiffs appealed.

(1) 3 Ch. D. 69. (2) See *The Carnarvon Castle*, 3 Mar. L. C. (C.A.) 607.

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THE NEWBATTLE.

Phillimore (*Aspinall*, with him), for the appellants.
Barnes, for the respondents, was not called on.

BRETT, M.R. The present case is clearly within the words of the 34th section of the Admiralty Court Act, 1861. It was argued by counsel for the plaintiffs that this order should not be made upon a sovereign prince. There are some cases indeed in which orders ought not to be made against a sovereign prince. In *The Parlement Belge* (1), where the King of the Belgians appeared under protest, and where the question was whether the ship could be arrested, it was decided that being a ship of a foreign prince it could not.

It has always, however, been held that if a sovereign prince invokes the jurisdiction of the Court as a plaintiff, the Court can make all proper orders against him. The Court has never hesitated to exercise its powers against a foreign government to this extent. It is another question as to what may be the result of an application for execution by seizure of the plaintiffs' ship, if the judgment should be against the plaintiffs.

COTTON, L.J. I think that this order appealed against was right. There is here a counter-claim, which is the same as a cross action, and s. 34 of the Admiralty Court Act, 1861, gives the Court power to make the order subject to the question whether it can be made against a foreign sovereign. It was decided in *The Parlement Belge* (1), that a ship belonging to the Belgian government could not be seized when that government were defendants in an action. But when a government comes in as a suitor, it submits to the jurisdiction of the Court and to all orders which may properly be made. Regard must of course be had to the fact that in this case the King of the Belgians is a sovereign prince, but the order is nevertheless a proper one. It is a reasonable principle that a plaintiff whose ship cannot be seized, and against whom a cross action has been brought, shall put the defendant in the same position as if he (the defendant) were a plaintiff in an original action against a defendant whose ship could be arrested as security.

(1) 5 P. D. 197.

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LINDLEY, L.J. I agree that the order appealed against is right; a counterclaim seems to me to be equivalent to the cross action mentioned in the Admiralty Court Act, 1861, and this case falls within both the letter and the spirit of that Act.

Solicitors for appellants: *Clarkson, Greenwell & Wyles.*
Solicitors for respondents: *Ingledew, Ince & Colt.*

E. S. R.

Jan. 28.

THE PALOMARES.

City of London Court—Warrant of Arrest—Service—London (City) Small Debts Extension Act, 1852 (15 & 16 *Vict. c. lxxvii.*), *s.* 18—*County Courts Admiralty Jurisdiction Act*, 1868 (31 & 32 *Vict. c.* 71, *s.* 23.)

A warrant of arrest in an action in rem was issued from the City of London Court directed to the high bailiff, and others the bailiffs thereof, but was, without authority from the Court, served by a clerk in the high bailiff's office:—

Held, affirming the decision of the judge of the City of London Court, that this was not a proper service of the warrant.

Per Sir James Hannen:—"Any officer" mentioned in 31 & 32 Vict. c. 71, s. 23, means any officer duly authorized by the Court.

Per Butt, J.:—That it means any officer whose ordinary duty it is to serve processes, or one duly authorized so to do.

APPEAL from a judgment of the judge of the City of London Court, whereby he refused to make absolute a rule nisi for the attachment of the master of the *Palomares* for contempt of Court on the ground that no legal arrest of the *Palomares* had taken place. The circumstances of the case were shortly that the mayor, municipality, and citizens of London were the plaintiffs in an action of damage in rem in the City of London Court against the *Palomares*. A warrant of arrest was duly issued from this court and directed in the proper form to the high bailiff of this court and others the bailiffs thereof. This warrant was however executed by one Watson, a clerk in the high bailiff's office, without any authority from the Court. The *Palomares*, after the service of the warrant, was taken out of the jurisdiction of the Court, though it appeared not with any intention to avoid liability, if any, in the action. The material point at issue, which arose on

the return of the rule nisi to attach the master for contempt, was whether the service of the warrant by a clerk in the high bailiff's office was a legal arrest of the ship. Mr. Commissioner Kerr held that it was not, on the ground that by the London (City) Small Debts Extension Act, 1852 (15 & 16 Vict. c. lxxvii.), s. 18, the warrant of arrest must be served by one of the high bailiffs themselves. (1)

Aspinall, for the appellants. This warrant was properly served. The learned commissioner has omitted to consider the County Courts Admiralty Jurisdiction Act (31 & 32 Vict. c. 71), s. 23 (2), by which any officer of a county court may execute a process of the court. The City of London Court is a county court, and Watson was a duly appointed officer of the court in accordance with 15 & 16 Vict. c. lxxvii., s. 11, as shewn by the affidavit of the town clerk. There is nothing in the County Court Rules and Orders, 1875, to prevent this state of things.

Lush-Wilson, for the respondent. "Any officer" in 31 & 32 Vict. c. 71, s. 23 (2), means any of the officers whose duty it is to serve processes, and these are the high bailiffs alone. The legislature by this section did not intend to widen the express words of the London (City) Small Debts Extension Act, s. 18.

SIR JAMES HANNEN. I am of opinion that this appeal must be dismissed. By the London (City) Small Debts Extension Act, 1852, s. 18 (1), the duty of executing all the warrants, precepts, &c., was entrusted to certain officers called bailiffs, and this Act restricted those officers from deputing their duties in this respect to anyone else. It is not now necessary to enlarge upon

(1) 15 & 16 Vict. c. lxxvii., s. 18: "That the said bailiffs shall attend every sitting of the Court for such time as shall be required by the judge, unless when their absence shall be allowed for reasonable cause by the judge, and shall by themselves serve all the summonses and orders and execute all the warrants, precepts, and writs issued out of the Court under the provisions of this Act."

(2) 31 & 32 Vict. c. 71, s. 23: "For the execution of any decree or order of a county court in an Admiralty cause, the Court may order, and the registrar on such order may seal and issue, and any officer of any county court may execute process according to general orders; provided that where under such process a vessel or property would or might be sold," &c.

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the reasons for this enactment. There are express words requiring that the bailiffs "shall by themselves serve all the summonses and orders, and execute all the warrants." If the matter had stood there, there would probably have been no argument. It would under those circumstances be clear that it was competent for no one else but the bailiffs to execute the warrant. Mr. Aspinall, however, has called our attention to the County Courts Admiralty Jurisdiction Act, 1868, s. 23, to which he says the learned commissioner did not direct his attention. My own opinion is, that the clerk, Mr. Watson, has been shewn by the existing state of things to be an officer of the county court, because the 11th section of the London (City) Small Debt Extension Act, 1852, requires that when a clerk is paid by salary the power of appointment is to be in the corporation. In this case Watson has been appointed by the corporation, and it pays his salary, and that, in my opinion, constitutes him an officer of the court. The County Courts Admiralty Jurisdiction Act, 1868, s. 23, provides that "For the execution of any decree or order of a county court in an Admiralty cause the Court may order, and the registrar on such order may seal and issue, and any officer of any county court may execute process according to general orders." I am disposed to think that there would be a power under the general orders to restrict the execution of process to particular individuals or a class of individuals that might be indicated, but I do not think that the words "any officer of the county court may execute process," are in fact annulled by the subsequent words, "according to general orders." I think that the class of persons is constituted by that section of the Act, who unless something to the contrary is shewn, would have the power to execute the orders of the Court. On the other hand it appears to be quite clear that it does not mean that any officer of the court may of his own motion execute the order. He must derive his authority from the Court. In this particular case no authority has been conferred by the Court on the clerks in the bailiff's office to execute warrants. In fact the warrant, according to its form, is directed specifically to the "high bailiff of the said court, and others the bailiffs thereof." Without entering into the other questions which have been touched upon, I think it is

sufficient for the present decision to say that the Court might direct its orders to any clerk, including Mr. Watson, but unless the Court does so direct its orders, then it is not competent for the high bailiff to delegate his authority to any clerk to execute the orders. For these reasons I think that the decision of the learned commissioner was right, and therefore this appeal must be dismissed with costs.

BUTT, J. I am of the same opinion, although I am not quite certain that I agree with all the reasons which my Lord has given for his decision. It appears to me that the London (City) Small Debts Extension Act, 1852, s. 18, having prescribed that the bailiffs shall by themselves serve summonses and execute warrants, the only answer suggested in argument to the view of the learned judge of the Court below on that section has been founded upon the County Courts Admiralty Jurisdiction Act, 1868, s. 23. The view I take of the wording of that section is this, that although the clerks for some purposes are officers of the court, yet I do not think they are officers of the court within the meaning of the words as used in s. 23 of the County Courts Admiralty Jurisdiction Act, 1868. That section seems to me to point to officers whose ordinary duty it is to serve summonses and execute warrants; though I am very far in making these observations from saying that I disagree with my Lord when he intimates an opinion, that in any case it might be open to the judge by order to direct any officer of the court to execute the summons. Thus agreeing substantially with all my Lord has said, I think the decision of the learned judge below was right, and that this appeal must be dismissed.

Appeal dismissed.

Solicitor for plaintiffs: *City of London Solicitor.*

Solicitor for the master of the *Palomares*: *Mark Shephard.*

E. S. R.

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Feb. 17.

THE VICTOR COVACEVICH.

*Practice—Inspection by Trinity Masters—*24 *Vict. c.* 10, *s.* 18.

Before the hearing of an action an application was made under 24 Vict. c. 10, s. 18, by the plaintiffs, that two Trinity masters should inspect the lights of the defendants' ship:—

Held, that the application was premature and ought to be refused.

MOTION on behalf of the plaintiffs in an action for damage by collision for an order for the inspection by two Trinity masters of the lights of the *Victor Covacevich*, before the hearing of the action.

Aspinall, for the motion. The application is made under 24 Vict. c. 10, s. 18. (1) There is no reported precedent for an order for such an inspection before the hearing, but it may take place equally before, as at, or after, the hearing. The lights of the *Victor Covacevich* were improperly screened, and it is material to the proper trial of the action that they should be inspected by the Trinity masters. The vessel is a foreign one, and may go out of this country.

Raikes, for the defendants, was not called upon.

BUTT, J. This seems to me to be an endeavour to substitute for the ordinary and regular evidence in the cause something else, which, under certain circumstances, may no doubt be resorted to. I am of opinion that the time has not yet come when an application such as is contemplated by the words of the section should be made. Moreover, I think there would be the gravest inconvenience in adopting a course which would tend to encourage the substitution of the reports of experts for the evidence in the case.

(1) Sect. 18. "Any party to a cause in the High Court of Admiralty shall be at liberty to apply to the said Court for an order for the inspection by the Trinity masters or others appointed for the trial of the said cause, or by the party himself and his witnesses, of any ship or other personal or real property the inspection of which may be material to the issue of the cause, and the Court may make such order in respect of the costs arising thereout as to it shall seem fit."

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It appears that those who are applying in this case have had abundant opportunity of inspecting these lights, and their position, and the mode in which they are fitted. It is not suggested that they cannot obtain evidence of these facts, and that being so I have no hesitation in refusing this application.

Solicitors for plaintiffs: *Pritchard & Sons.*
Solicitors for defendants: *Walton, Bubb, & Johnson.*

E. S. R.

THE NASMYTH.

Feb. 27.

Salvage—Agreement—Action by Seamen.

An agreement was made between the masters of the *W.* and the *N.*, which was in need of assistance, that the *W.* should tow the *N.* to Queenstown for the sum of 200*l.* There was no evidence at the trial to shew that the master of the *W.* consulted the officers and crew as to the terms of the agreement. The service was duly performed, and subsequently thirteen of the officers and crew of the *W.* brought an action of salvage against the *N.* The defendants pleaded, inter alia, that they had tendered 200*l.* to the owners of the *W.*, but this sum was not paid into Court:—

Held, first, that a plea of tender without a payment into Court was bad; secondly, that the agreement must be upheld, and the 200*l.* apportioned amongst the owners and crew of the *W.*; thirdly, that when a fair salvage agreement has been made in a bonâ fide manner by the masters of the salving and the salved vessels the officers and seamen of the salving ship ought not to bring an action of salvage, and that the plaintiffs must therefore pay the costs of the action.

ACTION of salvage by thirteen of the officers and crew of the steamship *Wordsworth* to recover salvage remuneration for services rendered to the steamship *Nasmyth* off the coast of Ireland on the 28th of September, 1884. The facts of the case, which were practically admitted, were as follows:—

The *Nasmyth*, a schooner-rigged screw steamer of about 2000 tons gross and 1303 tons net register, left New York on the 7th of September, 1884, bound for Liverpool with a general cargo; on the 16th September, she being in lat. 46° 17′ N., long. 30° 3′ W., her main shaft broke. There was a strong breeze blowing from the north-west, and a high sea at the time the shaft broke, and the ship made a good deal of water, which the pumps kept under. Sail was made upon the vessel, and she proceeded at about the

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rate of four or five knots an hour in an easterly direction, making her proper course, with her propeller revolving. The vessel continued under sail until the 28th of September, making for Liverpool, and exchanging signals with various vessels; and the services of a Cork pilot boat which came alongside were declined. At about 6 A.M. on the 28th of September, the *Wordsworth* was sighted, and the signal "K. R. J.," meaning "Can you tow me?" was hoisted. In answer to this the *Wordsworth* bore down on the *Nasmyth* and took her in tow after an agreement in the following terms had been made between the masters of the *Nasmyth* and the *Wordsworth*:—

"S.s. *Nasmyth*,
"Sept. 27th, 1884.

"I hereby agree to pay to the owners of the s.s. *Wordsworth* the sum of two hundred pounds on his anchoring us safe in Queenstown, for assistance rendered. Agreed by both masters. Provided that the towage is completed without any hitch, otherwise to be settled by arbitration.

"(Signed) F. W. Rendle, Master s.s. *Nasmyth*.
"(Signed) A. C. Cook, Master s.s. *Wordsworth*."

The distance and duration of the towage were put at about fifty-five miles and nine hours by the plaintiffs, and at about thirty-five miles and rather more than seven hours by the defendants respectively, and the weather throughout was fresh. After taking the *Nasmyth* into Queenstown the *Wordsworth* proceeded on her voyage without anchoring.

The value of the *Nasmyth*, her cargo and freight, was agreed at 52,665*l*.

Correspondence passed subsequently between the owners of the *Wordsworth* and the owners of the *Nasmyth*, the former complaining that the amount settled between the masters of the vessels was inadequate as remuneration for the services rendered, and that therefore the agreement was void; the latter expressing their belief that it was a fair payment for those services and expressing their readiness to pay that sum. The defendants pleaded the above agreement, and in paragraph 8 of the statement of defence also pleaded that they were always ready and willing to pay, and

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before action tendered to the owners, on behalf of all concerned, the agreed sum; but this sum was not paid into Court.

One witness was called on behalf of the plaintiffs; there was no evidence to shew that the master of the *Wordsworth* mentioned the terms of the above agreement to his officers and crew at the time it was made.

Deane, for the plaintiffs. The master had no authority to bind the crew by the agreement, nor was there any ratification of it by them. The sum named in the agreement is totally inadequate and inequitable.

Sir W. Phillimore, for the defendants. The sum mentioned in the agreement has been tendered as stated in the pleadings, though it has not been paid into court. No case has been made out to shew that the agreement was not a fair one.

BUTT, J. It has been properly admitted by Sir Walter Phillimore that the plea of tender without payment into Court of the sum mentioned is bad, and therefore I have to decide whether or not I shall uphold this agreement. It appears to me to be a fair agreement made in a bonâ fide manner, and one by which the master of the *Wordsworth* had authority to bind his owners and crew. So far as I have any observation to make on the amount, I think it is almost too large a sum for the services rendered. I am of opinion that it is against public policy and much to be deprecated that seamen should endeavour to upset such an agreement. I therefore uphold the agreement; I apportion the amount of 200*l* by giving to the owners of the *Wordsworth* 140*l*., to the master 20*l*., and to the other officers and the crew 40*l*., to be distributed according to their ratings. As I consider this action ought never to have been brought, I condemn the plaintiffs in the costs.

Solicitors for plaintiffs: *Rollit & Sons.*

Solicitors for defendants: *Pritchard & Sons, for Thornely & Cameron, Liverpool.*

E. S. R.

1885
Feb. 14.

[IN THE COURT OF APPEAL.]

THE HEINRICH BJORN.

Necessaries—Foreign Vessel—Maritime Lien—3 & 4 Vict. c. 65, s. 6—24 Vict. c. 10, s. 5—Bottomry Bond.

A foreign vessel was in an English port, and the owner, being temporarily in England and in want of funds for the purchase of necessaries, made an agreement with the plaintiffs by which, in consideration of their advancing him by cash or acceptance 600*l.* for necessaries supplied to and for the use of the vessel, he thereby undertook to return them the amount so advanced with interest and all charges on the return of the vessel from her voyage. And the plaintiffs were thereby authorized "to cover the amount advanced the owner by insurance on ship, &c., out and home at owner's cost."

In an action in rem for necessaries in respect of the amount so advanced:—

Held, by the Court of Appeal (Bowen and Fry, L.JJ., Brett, M.R., doubting), first, that this agreement was not equivalent to a bottomry bond; secondly (by the whole Court) that there was no lien for necessaries; for that before 3 & 4 Vict. c. 65, s. 6 (1), there was no maritime lien on a foreign ship for necessaries supplied to her, that that section did not give any maritime lien but only a right to seize the ship on the institution of an action, and therefore that the plaintiffs were not entitled to recover against the vessel.

Judgment of Sir J. Hannen (8 P. D. 151) reversed.

The Ella A. Clark (Br. & L. 32) overruled. *The Two Ellens* (Law Rep. 4 P. C. 161) explained.

Appeal by the defendants in an action in rem for necessaries, from a decision of Sir James Hannen (2), whereby he decided that the plaintiffs, shipbrokers in London, were entitled to recover against the *Heinrich Bjorn* a sum in respect of necessaries supplied, but were not entitled to recover a sum paid in respect of a policy of insurance on the ground that the premiums of insurance could not be considered as necessaries. At the hearing of the case before Sir James Hannen the defendants contended that the

(1) 3 & 4 Vict. c. 65, s. 6: "And be it enacted, that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to or damage received by any ship or seagoing vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or seagoing vessel and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered or damage received or necessaries furnished in respect of which such claim is made."

(2) 8 P. D. 151

plaintiffs were not entitled to recover in the action because, as they alleged, there had not been any real supply of necessaries or money for the purchase of necessaries by the plaintiffs, but that the necessaries, if any, had been paid for out of the freight earned by the *Heinrich Bjorn*. At the hearing of the appeal the larger question, whether there was in law a maritime lien for necessaries, was raised, and also the question whether the contract out of which the action arose was not in reality a contract of bottomry.

The facts of the case, so far as they are pertinent to the decision of the Court of Appeal, and as subsequently stated in the judgment of that Court, were as follows:—On the 23rd of March, 1882, Gunder Abrahamsen was the owner of five-sixth shares in the Norwegian ship *Heinrich Bjorn*, and was the managing owner of the ship, which was then lying at Liverpool, under the care of Messrs. Brodersen, Vaughan, & Co., shipbrokers there. Shortly before this date, viz., on the 10th of March, a charterparty of the ship from Liverpool to Tabasco, and back to Liverpool, had been negotiated by the plaintiffs, Messrs. Northcote, shipbrokers, of London, who had for years acted as agents for Abrahamsen. On this 23rd of March, 1882, Abrahamsen, having come from Norway to London, entered into a transaction with the plaintiffs which was embodied in a memorandum of agreement signed by Abrahamsen, which was as follows:—

"In consideration of C. & C. J. Northcote advancing me, Gunder Abrahamsen, by cash or acceptance an amount of about 600*l*., say six hundred pounds British sterling, for necessaries supplied to and for the use of my barque *Heinrich Bjorn*, of Krageroe, Norway, I hereby undertake to return them the whole amount so advanced me with interest and all charges on the return of the said barque *Heinrich Bjorn* from her present voyage as concluded for me by C. & C. J. Northcote as per charterparty dated 10th of March, 1882.

"I hereby declare that I, Gunder Abrahamsen, am sole managing owner of the said *Heinrich Bjorn*, and that the only part owner with me in her is the present master, J. Boe, who owns one-sixth, say one-sixth share.

"C. & C. J. Northcote are also authorized by me to cover the said amount advanced me by insurance on ship, &c., &c., out and

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home at my cost. This insurance to be effected either here or in Norway."

From the evidence tendered by the plaintiffs it appeared that Abrahamsen shortly after the transaction in question went into liquidation, and that the five-sixths of the vessel belonging to his estate were prior to the commencement of this action sold to Natvig, Aaldborg, and others, who were therefore the defendants in the present proceedings.

The further circumstances under which the above agreement was drawn up, are stated in the report of the case when before Sir James Hannen, but they are not material to the decision of the Court of Appeal.

The case was heard on May 6, 8, 19; June 13, 14; December 20.

Myburgh, Q.C., and *Pyke*, for the defendants. The transaction between the plaintiffs and Abrahamsen was not a bonâ fide one, there was no real supply by the plaintiffs of cash for the purchase of necessaries. Abrahamsen had the right to receive the freight of the completed voyage from Brodersen, Vaughan & Co., with which he could have disbursed the ship, and this being so, there was no necessity for cash from the plaintiffs, and so no supply of money for necessaries: *The Sophie* (1); *The Alexander.* (2) There must be an existing exigency: *The Ocean* (3); which was not present here. There must be a want of funds, which also was not the case here: *The Augusta* (4), for an owner can borrow money on his personal security, and this negatives necessity: *The Onni* (5); *The Lochiel.* (6) There is no maritime lien for necessaries, and therefore no foundation for an action in rem; 3 & 4 Vict. c. 65, s. 6, does not in express terms create a maritime lien. *The Ella A. Clark* (7) and *The Two Ellens* (8), if authorities to the contrary, are not binding on this Court, and *The Pacific* (9) is an authority against them, and also Abbott on Shipping, 5th ed., pp. 108, 109.

[The following cases were also incidentally referred to in the

(1) 1 Wm. Rob. 368.
(2) 1 Wm. Rob. 294.
(3) 2 Wm. Rob. 368.
(4) 1 Dods. 283.
(5) Lush. 154.
(6) 2 Wm. Rob. 34.
(7) Br. & L. 32.
(8) 4 P. C. 161.

course of the argument: *The Duke of Bedford* (1); *The Heligoland* (2); *The Helena Sophia* (3); *The Albert Crosby* (4); *The San Jago de Cuba* (5); *The Kalorama.* (6)]

Hall, Q.C., and *Raikes*, for the plaintiffs. A maritime lien attached to the vessel; even if there is no maritime lien the purchasers took this vessel with notice of this charge, and are therefore liable in this action. As to the maritime lien, all the elements necessary to create one are present here; before the passing of 3 & 4 Vict. c. 65, s. 6, there was a lien for necessaries supplied elsewhere than in the body of a county, that Act extended the lien. There is abundant direct authority in favour of the maritime lien for necessaries: *The Flecha* (7); *The West Friesland* (8); *The Ella A. Clark* (9); *The Two Ellens* (10); *The Rio Tinto.* (11) The fact that no lien is given in respect of British vessels by 24 Vict. c. 10, s. 5, shews that a lien was meant to be given by the previous Act on foreign vessels. There was here an express contract shewing an intention to create a maritime lien. If there is a maritime lien the presence of the owner does not make the present less a claim for necessaries if the things for the vessel were reasonably necessary: *Webster* v. *Seekamp* (12); if he has no money or credit he can hypothecate his vessel, or charge it with a lien for necessaries: *The Riga* (13); *The Grapeshot* (14); *The James Guy* (15); *The Kalorama* (6); it makes no difference whether necessaries were supplied or money for the purchase of necessaries: *The Onni.* (16) [They referred also to the statute law of the United States: Revised Statutes of United States, 1873–74, title xlviii., ch. 1, s. 4192; Revised Statutes of the State of New York, pt. ii., ch. vii., title ii., ss. 9, 10.] The fact that the parties made an agreement in the matter does not alter this position. This document may also be sued on as a bottomry bond.

(1) 2 Hagg. 294.
(2) Swa. 491.
(3) 3 Wm. Rob. 265.
(4) 3 Ad. & E. 37.
(5) 9 Wheaton, 409.
(6) 10 Wallace, 204.
(7) 1 Spk. Ecc. & Ad. 438.
(8) Swa. 454.
(9) Br. & L. 32.
(10) 4 P. C. 161.
(11) 9 App. Cas. 356.
(12) 4 B. & A. 352.
(13) 3 Ad. & E. 516.
(14) 9 Wallace, 129.
(15) 1 Benedict, 112.
(16) Lush. 154.

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Myburgh, Q.C., in reply.

Cur. adv. vult.

Dec. 20. The Court heard further argument as to whether the contract in question was or was not a bottomry bond.

Myburgh, Q.C. (*Pyke* with him), for the defendants. This is not a bottomry bond, for there cannot be a valid contract of bottomry without maritime risk and with personal liability: *The Atlas* (1); *Stainbank* v. *Shepard.* (2) The whole contract of bottomry must be in writing: *The Emancipation* (3); this contract on its face is not one of bottomry, and no maritime interest being agreed upon raises a presumption against this being a bottomry bond: *The Royal Arch* (4); a part owner cannot bottomry the whole ship. [He also referred to *The Zodiac.* (5)]

Hall, Q.C. (*Raikes* with him), for the plaintiffs. This is a bottomry bond, it has all the elements of one. It is not essential that the maritime interest should be stated: *The Empusa* (6); the bond may be in any form if the purport is clear: *The Kennersley Castle.* (7) The fact of a bond being given by the owner does not invalidate it: *The Duke of Bedford* (8); *The Heligoland* (9); *The Dante.* (10) In America there is express authority to this effect: *The Draco.* (11)

Cur. adv. vult.

Feb. 14. The judgment of the Court (Brett, M.R., Bowen and and Fry, L.JJ.) was delivered by

FRY, L.J. This judgment is that of the Master of the Rolls, Bowen, L.J., and myself; but I should state that in that portion of it which decides that the agreement, which I shall presently read, is not a bottomry bond, the Master of the Rolls concurs with difficulty. But he unhesitatingly agrees with the remainder of the judgment. [The learned judge then stated the material facts as above set out, and proceeded:—] The question in this action is whether the present owners can be affected with liability

(1) 2 Hagg. 48.
(2) 13 C. B. 418.
(3) 1 Wm. Rob. 124.
(4) Swa. 269.
(5) 1 Hagg. 320.
(6) 5 P. D. 6.
(7) 3 Hagg. 7.
(8) 2 Hagg. 294.
(9) Swa. 491.
(10) 2 W. Rob. 427.
(11) 2 Sumner, 157.

under the contract of the 23rd of March, 1882, and as they were not parties to that transaction they can only be so affected if the contract in question created a charge upon the ship which they purchased.

The case was commenced and continued down to the hearing as an action for necessaries, without any suggestion that the contract in question was a contract of bottomry, and apparently on the hypothesis that a contract for the supply of necessaries created a maritime lien.

The same view seems to have been acted upon by both parties at the trial, and we do not find that the learned judge's attention was drawn to the inquiry whether that view of the nature of a contract for necessaries was correct, nor to the question whether the contract could be considered as, or was in fact, a contract of bottomry. On the contrary, the questions raised at the trial and the questions on which, therefore, evidence was given, appear to us to have been, first, whether the contract produced was a bonâ fide contract, or whether, as the defendants alleged, it was a scheme for charging on the ship the private debts of the part-owner; and, secondly, whether the plaintiff's claim for repairs was or was not too large. When, however, the case came before us on appeal, the point was raised whether a contract for necessaries does, by the law of England, create a maritime lien, and this question was accordingly argued before us at length. At a later stage, a further question, whether the contract sued on was not in truth a bottomry contract, was raised and argued before us by one counsel on each side.

We will approach these questions in an opposite order to that in which they were argued. Both sides have more or less relied on the parol evidence given in the case as to the true result of the contract. We entertain grave doubts whether the evidence can be relied on for that purpose. We think that it was perfectly admissible for the issue before the learned President, viz., whether the contract was a fraud or not; but we think that it is not admissible to qualify or shew the real intention of the parties to a written agreement. Taking the contract, then, as expressed in the written document signed by Abrahamsen, it must be inquired whether it charges the ship, and whether the lender

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assumes the maritime risk. It appears to us that the contract creates no charge upon the ship; on the contrary, the security taken is of an alternative kind; in the event of the return of the ship from her present voyage, the lender is to look to the borrower personally, and to enforce the liability created by the words, "I hereby undertake." In the event of the ship being lost on her voyage, the lender is to look to the equitable charge on the policies which is created by the authority given to the lenders to insure the ship at the cost of the borrower. For the same reasons it appears to us that the lender does not take the maritime risk: on the contrary he takes a contract which gives him an alternative security excluding all risk at all. This is not, as it appears to us, one of those cases in which the parties, having plainly intended to create a bottomry contract, have erred in some particular, in which cases the Court may reject the erroneous particular; on the contrary, the notion of bottomry was absent from the minds of all the parties; the evidence is not addressed to it, it is not mentioned in the written document, in the oral evidence, in the pleadings, or in the judgment of Sir James Hannen, nor in the arguments before us, till some observations on it fell from the junior counsel for the plaintiffs. We therefore feel bound to conclude that the contract in question was not a contract of bottomry.

The question therefore arises: does a contract entered into with a managing part-owner for the loan of money to be laid out in necessaries for a ship create a maritime lien?

It is, we think, clear that such a loan places the lender in the same position as the person who has actually supplied the necessaries to a ship.

Before the passing of the statute 3 & 4 Vict. c. 65, no such lien was recognised by the law of England. This point was fully discussed in a passage in Abbott on Shipping, which has often been referred to, and the conclusion arrived at by the learned writer is beyond doubt a correct statement, both of the civil law and of the old law of England on the point. "Every man," says the learned Chief Justice (Abbott on Shipping, 5th ed., pp. 108, 109), "who had repaired or fitted out a ship, or lent money to be employed in those services, had by the law of Rome, and still

possesses, in those nations which have adopted the civil law as the basis of their jurisprudence, a privilege or right of payment in preference to other creditors, upon the value of the ship itself, without any instrument of hypothecation, or any express contract or agreement subjecting the ship to such a claim. This privilege exists in France, not only while the ship remains in the possession of the owner, but even after a sale to a third person for some period of time."

"It appears," he adds, "that the law of England has not adopted this rule of the civil law with regard to repairs and necessaries furnished here in England. A shipwright, indeed, who has taken a ship into his own possession to repair it, may not be bound to part with the possession until he is paid for the repairs, any more than a tailor, a smith, or other artificer in regard to the object of his particular trade, unless there be a special agreement to give credit for a certain period, or such an usage in the trade as is equivalent to a special agreement. But a shipwright who has once parted with the possession of the ship, or has worked upon it without taking possession, and a tradesman who has provided ropes, sails, provisions, or other necessaries for a ship, are not, by the law of England, preferred to other creditors, nor have any particular claim or lien upon the ship itself for the recovery of their demands."

In the case of *The Neptune* (1) decided by the Privy Council in 1835, not only was the law as laid down by Lord Tenterden accepted as governing the case of material men suing in rem, but as carrying with it the further conclusion that material men have no lien on the proceeds of a ship sold under a decree of the Court for the payment of seamen's wages. "This decision," said Dr. Lushington in *The Pacific* (2), "took away the last vestige of Admiralty jurisdiction in the case of necessaries; and from that date till the recent statutes the material man had no locus standi whatever in the Admiralty Court."

The next inquiry, therefore, is whether the legislation of the present reign has created a lien on the ship in favour of material men which did not previously exist.

By the 6th section of 3 & 4 Vict. c. 65, passed in the year

(1) 3 Knapp, P. C. Cases, 94. (2) Br. & L. 243.

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1840, it was enacted "that the High Court of Admiralty shall have jurisdiction to decide all claims and demands whatsoever in the nature of salvage for services rendered to, or damage received by, any ship or sea-going vessel, or in the nature of towage, or for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof, whether such ship or vessel may have been within the body of a county or upon the high seas at the time when the services were rendered, or damage received, or necessaries furnished, in respect of which such claim is made." This clause gives the Admiralty Court jurisdiction in respect of four kinds of claim—

(1) for salvage services rendered to any ship;

(2) for damage received by any ship;

(3) for towage services rendered to any foreign ship;

(4) for necessaries supplied to any foreign ship;

and in order to understand the operation of the clause it seems necessary to inquire how the law stood with reference to these claims before the statute passed.

Shortly that law was as follows: that ever since the 15 Rich. 2, c. 5, the Judges of the Admiralty Court were restrained from "meddling of anything done within the realm" and were confined to things done upon the high sea; so that whilst in respect of salvage services and damage done by collision on the high seas, it recognised a maritime lien in favour of the person rendering the services or sustaining the damage, it had no jurisdiction whatever where the services were rendered or damage done within the body of a county; that as regards towage, which was only then coming into use, the Court had no jurisdiction whatever (per Dr. Lushington, *The Wataga* (1)); that as regards necessaries supplied to a foreign ship the Court had no jurisdiction at all, and that in no case had the English law recognised the supply of necessaries or the doing of repairs as constituting a maritime lien.

Such being the position of the law with regard to these several claims, the clause just read gives the Court of Admiralty jurisdiction with regard to all of them, whether the ship in question was within the body of a county or upon the high seas; but the clause

(1) Sw. 165.

is silent as to the nature of the jurisdiction, and words simply giving jurisdiction do not seem appropriate or adequate to the creation of so important a right as that conferred by a maritime lien, a right towards which too the law of England was less friendly than the law of Rome and of the countries which have adopted the civil law.

It has been suggested that the way in which necessaries are associated with salvage and damage implies an intention to give in respect of necessaries the same lien as existed in respect of salvage, but the argument is not satisfactory, especially when it is observed (1) that necessaries are more closely associated with towage, which gave no lien, than with salvage or damage; (2) that s. 4 of the same Act gave the Court jurisdiction to decide all questions of salvage, damage, wages or bottomry, and that this was so far from creating a lien in favour of a master's wages, though the word "wages" is closely associated with claims protected by maritime liens, that the legislature subsequently interfered to give a master this lien. Indeed it is difficult to suppose that if the legislature had intended to create a maritime lien it would not have done so by express words. When, as on two occasions during this reign has been the case, the legislature has been minded to create a maritime lien in favour of a master's wages it has done so by express words. Thus by the statute 7 & 8 Vict. c. 112, s. 16, it was enacted that all the rights, liens, privileges and remedies (save such remedies as are against a master himself) which by that Act, or by any law, custom, statute or usage, belonged to any seaman, not being a master mariner, in respect to the recovery of his wages, should in the case of the bankruptcy or insolvency of the owner of the ship also belong and be extended to master mariners in respect to the recovery of wages due to them from the owner of any ship belonging to any of Her Majesty's subjects; and almost precisely similar words, omitting those relating to the bankruptcy or insolvency of the owner, are found in the Merchant Shipping Act, 1854, s. 191.

But how and in what manner was the new jurisdiction thus given to the Admiralty Court by the statute of 1840 to be exercised?

The answer is, that it must be exercised in the manner familiar to the Court of Admiralty and to all courts regulated by the

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civil law, either by an arrest of the person of the defendant if within the realm, or by the arrest of any personal property of the defendant within the realm, whether the ship in question or any other chattel, or by proceedings against the real property of the defendant within the realm: *The Charkieh* (1); see also per Dr. Lushington, *The Alexander Larsen.* (2)

But if the material man may thus arrest the property to enforce his claim, how does his claim differ from a maritime lien? The answer is, that a maritime lien arises the moment the event occurs which creates it; the proceeding in rem which perfects the inchoate right relates back to the period when it first attached: "the maritime lien travels with the thing into whosesoever possession it may come": *The Bold Buccleugh* (3); and the arrest can extend only to the ship subject to the lien. But, on the contrary, the arrest of a vessel under the statute is only one of several possible alternative proceedings ad fundandam jurisdictionem; no right in the ship or against the ship is created at any time before the arrest; it has no relation back to any earlier period; it is available only against the property of the person who owes the debt for necessaries; and the arrest need not be of the ship in question, but may be of any property of the defendant within the realm. The two proceedings, therefore, though approaching one another in form, are different in substance: in the one case the arrest is to give effect to a pre-existent lien, in the other, the arrest is only one of several alternative modes of procedure, because, to use the language of Dr. Lushington in *The Volant* (4), "it offers the greatest security for obtaining substantial justice in furnishing a security for prompt and immediate payment."

We shall now inquire how far the authorities are consonant with the conclusion that the statute 3 & 4 Vict. c. 65, s. 6, gave no maritime lien to the material man. For if, on examining them, it should appear that any clear course of decision or practice had arisen in favour of such a lien, we should be very unwilling to disturb it. The first contested case which came before the Courts on the statute of 1840 was the case of *The Alexander Larsen* (2), in November, 1841, where the question mooted was whether the Act

(1) 4 A. & E. 59, 91.
(2) 1 Wm. Rob. 288 (294).
(3) 7 Moo. P. C. 267, 284, 285.
(4) 1 Wm. Rob. 383.

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gave a remedy in favour of persons who had supplied necessaries before the Act came into operation; in the course of his discussion of that question, Dr. Lushington said: "The statute does not create a lien upon the vessel at all; the debt has no foundation upon the statute. The effect of the statute is expressly declared in the sixth section in these terms:—'That the Court of Admiralty shall have jurisdiction to decide all claims and demands whatever for necessaries supplied to any foreign ship or sea-going vessel, and to enforce the payment thereof.' The statute therefore simply confers upon the Court a jurisdiction to be employed in every lawful mode which the Court has the power to exercise for enforcing the payment; it might be by arresting the person of the owner, if he were resident here, or by arresting the property in case a necessity occurred."

The same case came before the Court in March, 1842, sub nom. *The Alexander* (1), and there Dr. Lushington observed "that when the recent statute conferred upon this Court a jurisdiction in these matters, or rather, perhaps, revived an ancient jurisdiction long prohibited, it never was nor could be intended to alter the law, but merely to give a new remedy which was rendered necessary in the peculiar case of foreign ships." It is perhaps scarcely to be doubted that the jurisdiction given by the statute was a new one and not an old one revived; for the jurisdiction formerly asserted was, of course, prohibited on the ground that it did not exist.

In 1845 the case of *The Ocean* (2) came before the same learned judge, and the point decided was that articles supplied for the equipment of a vessel building in a foreign dock were not necessaries within the statute in question: but in the course of the judgment the learned judge made these observations: "Before the statute was passed all claims for salvage and all questions of damage as well as demands for towage services, where the transaction took place within the body of a county, were cognizable in the courts of common law alone; if this Court had proceeded to adjudicate in the matter it would have been subjected to a prohibition. For the convenience of parties who might so render services or receive a damage, it was deemed expedient to restore

(1) 1 Wm. Rob. 346 (360). (2) 2 Wm. Rob. 368.

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the ancient jurisdiction of the Court of Admiralty," *i.e.*, if we rightly read the learned judge, in cases arising within the body of a county.

In *The Flecha* (1), decided in July, 1854, Dr. Lushington said that not the least important amongst the reasons for the passing of the section of the statute in question was that the law of this country might in that respect be assimilated to the general law of the maritime states of Europe,—the first statement we have been able to find from the lips of this learned judge which at all leans towards the conclusion that the material men would acquire a lien under the statute. In 1859 Dr. Lushington, however, further departed from his view that the statutes created no maritime lien in favour of the material men. In *The West Friesland* (2), which was a cause of necessaries brought by the material men against the subsequent purchasers of the ship, Dr. Lushington said that the purchaser of a ship takes subject to liens, and pronounced for the plaintiffs. This case went to the Privy Council (3), and there the Court, observing that important questions of law had been raised in the argument, expressed no opinion upon them, but reversed the decision of the Admiralty Court on the facts of the case, holding that the material men failed to raise a case on those facts. This case, therefore, comes to nothing as an authority on the point in question, and whatever may have been the exact nature of Dr. Lushington's decision in that case, he seems to have soon reverted to his early view, for in the year 1862, in the case of *The Gustaf* (4), Dr. Lushington in his judgment said, "claims for necessaries, moreover, do not possess, ab origine, a lien; but carry only a statutory remedy against the res, which is essentially different."

Meanwhile, in the year 1861, was passed the statute 24 Vict. c. 10, of which the 5th section, omitting an immaterial proviso, is as follows: "The High Court of Admiralty shall have jurisdiction over any claim for necessaries supplied to any ship elsewhere than in the port to which the ship belongs, unless it is shewn to the satisfaction of the Court that at the time of the institution of

(1) 1 Spk. Ecc. & Ad. 438.
(2) Sw. 454.
(3) Sw. 456, and also, sub. nom. *The Twentje*, 13 Moo. P. C. 185.
(4) Lush. 506.

the cause any owner or part owner of the ship is domiciled in England or Wales." By s. 35 of the same Act it was declared that "the jurisdiction conferred by this Act on the High Court of Admiralty may be exercised by proceedings in rem, or by proceedings in personam." It is evident that the 5th section of this Act is closely connected with the enactment which has been under discussion hitherto; and the view which it will be seen was adopted by Dr. Lushington, that these two statutes were in pari materiâ, appears to us to be well founded.

In 1863 *The Ella A. Clark* (1) came before Dr. Lushington on a question arising on the statute 3 & 4 Vict. c. 65, where the learned judge held that a claim for necessaries supplied to a foreign ship might be enforced by proceedings in rem under the statute, notwithstanding a subsequent and bonâ fide transfer to a British owner. "When the legislature thought fit," said the learned judge, "to put masters' wages on the same footing as seamen's wages, they did, as relates to this Court, constitute masters' wages a maritime lien, and looking through the several recent statutes I am led to the general conclusion that when the legislature has appointed the proceeding in rem, they intended to give the same remedy as heretofore was in use in this Court in the administration of justice in cases of maritime lien, though no express words may be used to that effect." This language of the learned judge is not perhaps absolutely free from ambiguity, because it refers to remedy only, and not to rights; but the decision rests upon the proposition that whenever the legislature had by recent legislation given a proceeding in rem there it had created a maritime lien. It is remarkable that the distinction between the language of the legislature when it gave a maritime lien to the master for his wages, and when it gave a proceeding in respect of necessaries, did not attract the notice of the learned judge.

In the following year, 1864, arose the case of *The Pacific* (2). There the plaintiff sued the vessel, which was a British ship, for necessaries supplied, and the defendants, who were mortgagees, intervened. The case therefore arose under the statute of 1861, but Dr. Lushington reviewed the whole law on the subject in a

(1) Br. & L. 32.

(2) Br. & L. 243.

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judgment of which the following are material portions:—"The decision of the Privy Council in the case of *The Neptune* (1), given in the year 1835, took away the last vestige of Admiralty jurisdiction in the case of necessaries; and from that date till the recent statutes, the material man had no locus standi whatever in the Admiralty Court. His only remedy was in the Common Law Courts; and there, unlike the mortgagee, he could proceed only against the shipowner, not against the ship. This state of things was altered by the 3 & 4 Vict. c. 65, s. 6, which gave the Court jurisdiction over claims for necessaries supplied to a foreign ship, but that statute not applying to British ships, the 24 Vict. c. 10, s. 5, gave jurisdiction over claims for necessaries supplied to any ship, subject to two provisoes, that the supply should have been made elsewhere than in the port to which the ship belongs, and that at the date of the institution of the suit the shipowner should not be domiciled in this country. These enactments may seem diverse; but the reason for them is plain and uniform. Against the foreign vessel a real action is given to the material man in all cases, because the owner is assumed to be beyond the jurisdiction. And it is also denied against a British vessel, in case the necessaries have been supplied in the home port, because the presumption is that the supply was made upon the personal credit of the owner, who would there be known and trusted. In short the remedy against the ship is given only where a personal action against the owner would be fruitless; and not even then, when the supply is to be assumed to have been made on his personal credit. The material man, therefore, by the mere fact of his supplying necessaries, in no case obtains the ship as a security until he institutes his suit in this court; and in the case of a British ship (like the present), he may never obtain it at all, if, by reason of the owner having a domicile in this country, the suit cannot be instituted. This I think shews that the material man has not a maritime lien, for a maritime lien accrues from the instant of the circumstances creating it, and not from the date of the intervention of the Court."

In *The Troubadour* (2), a case of necessaries against a British

(1) 3 Knapp, 94. (2) 1 A. & E. 302.

ship which occurred in 1866, Dr. Lushington followed his decision in *The Pacific* (1), and re-asserted that until institution of suit a necessaries man has no claim upon the vessel.

In 1871, in *The Two Ellens* (2), Sir Robert Phillimore had to determine whether, as the law was then and is now, the material man has a maritime lien upon a British ship under the statute of 1861, and after reviewing several of the decisions of Dr. Lushington, he expressed his inability to acquiesce in the reasoning on which the judgment in *The Pacific* (1) was founded, or to reconcile that reasoning with the judgment in *The Ella A. Clark.* (3) "The two statutes ought," he said, "I should have ventured to think, to be construed as being in pari materiâ." He further said that he should have thought that in the case of material men there was an inchoate lien before the institution of the suit, but nevertheless he determined to follow Dr. Lushington in the case of *The Pacific* (1), and held that there was no such lien. This case was naturally carried to the Privy Council (4), when the decision of the Court below, to the effect that no maritime lien was created by the statute of 1861 against a British ship, was upheld. In the course of the judgment which was delivered by Mellish, L.J., after referring to the statute of 1841, he said: "In the construction of this section it has been held in several cases in the Court of Admiralty that there is a maritime lien in the case of supplies and necessaries furnished to a foreign ship, and their Lordships do not mean to intimate any doubts as to the validity of those decisions; but they are of opinion that those decisions may be supported upon the ground that, though it is perfectly true that the only words used in the section are 'that the High Court of Admiralty shall have jurisdiction,' which words seem hardly sufficient in themselves to create a maritime lien, yet, looking at the subject-matter to which that section relates, it appears designed to enlarge the jurisdiction which the Court of Admiralty already had in matters forming the subject of a maritime lien. These are strong grounds for holding that, as respects salvage and as respects collision, which already gave a maritime lien when they occurred on the high seas, it was in-

(1) Br. & L. 243.
(2) 3 A. & E. 345.
(3) Br. & L. 32.
(4) Law Rep. 4 P. C. 161.

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tended that they should also, when they occurred in the body of a county, equally give a maritime lien; and that being so as to salvage and collision, it might be well said that 'necessaries' immediately following, it was intended that the same rule should apply in the case of necessaries." If this was really a decision of the point in question, it would no doubt be of the last importance; but to us it appears that the Court merely suggested a distinction between the two statutes which rendered, in their opinion, a decision on the later enactments not conclusive on the earlier ones. In the case of *The Pieve Superiore* (1), in 1874, the Privy Council again accepted the view that s. 6 of the Act of 1861 did not confer any maritime lien for the reasons given in the case of *The Two Ellens.* (2)

The result of this long catena of authorities is hardly satisfactory; it shews that for several years Dr. Lushington repelled the notion that the statutes of 1840 created any maritime lien in favour of the material man; it shews that in one or more cases he admitted the opposite view, but that at a yet later date he reverted to the earlier conclusion; and that in the one case, that of *The Ella A. Clark* (3), in which he formally decided in favour of the lien, he did so on a principle of construction, namely, that when the legislature gave a proceeding in rem then it created a maritime lien, and that this principle was rejected by the learned judge himself in the next case of *The Pacific* (4), and by the Privy Council in the case of *The Two Ellens.* (2)

It appears to us that upon the whole the current of authorities is against the existence of the lien; but the most important result, in our opinion, is the negative one that there has been no settled or uniform current of authority or of practice in the Admiralty Court in favour of the lien, and that the question is therefore properly open for decision on principle.

In our opinion the two statutes of 1840 and 1861 ought (notwithstanding the observations of Mellish, L.J., in *The Two Ellens* (2)) to be construed as in pari materiâ, and we think that the decision of the Privy Council in that case lends confirmation to the conclusion at which we arrive, namely, that

(1) Law Rep. 5 P. C. 482.
(2) Law Rep. 4 P. C. 161.
(3) Br. & L. 32.
(4) Br. & L. 243.

whilst the statute of 1840 has enabled the material man to enforce his claim in the Admiralty Court, and as one means has given him a right to arrest the ship, it has given him no maritime lien, and consequently no right against the ship till action brought.

It does not appear to us probable that the legislature, whilst giving a remedy against both foreign and British ships, should have created a lien in the one case which it did not create in the other. To hold that the remedies are alike in the two cases is, we think, more consistent with international comity than an opposite decision would be.

Mr. Hall suggested that if there was no maritime lien, nevertheless the defendants in the present case were purchasers with notice of the plaintiffs' claim. But whilst notice of an equitable lien affects a purchaser of the legal estate, notice of a mere personal claim against the vendor has no such effect; and it appears to us that there is no pretence for contending that the supply of necessaries creates any equitable lien against the ship, and this argument (which, indeed, Mr. Hall did not press upon us) is untenable.

Our conclusion is that the appeal must be allowed, and the plaintiffs' action dismissed with costs here and in the Court below.

Appeal allowed.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Irvine & Hodges.*

E. S. R.

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March 11.

THE SOLIS.

Practice—Writ in rem—Service—Action by default—Rules of the Supreme Court, 1883, *Order IX., rr.* 11, 12; *Order XIII., rr.* 12, 13; *Order LXVII., r.* 14.

In an action in rem the writ of summons was served in the manner provided by Order IX., rule 12, no appearance was entered, and the action came on for judgment by default under Order XIII., rules 12, 13. The affidavit of service of the writ was made by the solicitor's clerk who had served such writ:—

Held, that service of a writ in rem by a solicitor or his clerk, and not by the marshal or his substitute, was a valid service, and that the affidavit was sufficient.

Action by default. The action was brought in rem on a bottomry bond. The writ of summons had been served as provided by Order IX., rule 12, by the affixing of the writ on the mast of the *Solis*, and such service was verified by the affidavit of the solicitor's clerk, by whom it had been served as mentioned above. A statement of claim had also been duly filed, and the case came before the Court under Order XIII., rules 12, 13. (1)

March 3. *Bucknill*, for the plaintiff.

Upon the application for judgment under the above circumstances,

Butt, J., drew the attention of counsel to the fact that the affidavit shewed that service of the writ had been effected by the solicitor's clerk and not by the marshal, and adjourned the case

(1) Rules of the Supreme Court, 1883, Order XIII., rules 12 and 13.

"12. In all actions not by the rules of this Order otherwise specially provided for, in case the party served with the writ, or in Admiralty actions in rem the defendant, does not appear within the time limited for appearance, upon the filing by the plaintiff of a proper affidavit of service, and, if the writ is not specially indorsed under Order III., rule 6, of a statement of claim, the action may proceed as if such party had appeared, subject, as to actions where an account is claimed, to the provisions of Order XV."

"13. In Admiralty actions in rem, upon default of appearance, if, when the action comes before him, the judge is satisfied that the plaintiff's claim is well founded, he may pronounce for the claim with or without a reference to the Admiralty registrar or to the Admiralty registrar assisted by merchants, and may at the same time order the property to be appraised and sold, with or without previous notice, and the proceeds to be paid into Court, or may make such order as he shall think just."

in order that the point, whether a service of a writ of summons in rem by a person other than the marshal or his substitute was valid, might be fully considered.

March 11. *Bucknill*, for the plaintiff. The service by the solicitor's clerk is valid, and in accordance with the existing practice. The form of indorsement on a writ of summons in rem given by the Rules of the Supreme Court, 1883, App. A, Form 11, does not direct that the person making the indorsement shall be the marshal or a substitute. Order IX., rule 11 (1), distinctly states that the warrant shall be served by the marshal, but Order IX., rule 12 (2), which states how the writ is to be served, does not state that it is to be served by the same persons as the warrant, or by whom, and therefore it may be presumed that it was not intended that it should be served by the marshal. In the Common Law Courts before the Judicature Acts, any educated person might serve a writ of summons: Lush's Practice, 374; these Acts were intended to assimilate the procedure of the Courts. Before these Acts, actions in rem were begun by a precept being filed in the registry, and the issue of a warrant of arrest which also contained a citation, and a separate citation in rem served by the marshal was only required when a second action was begun against a vessel under arrest: Rules of the High Court of Admiralty, 1859, Nos. 16 and 17. There was then no writ of summons, and therefore no practice analogous to the present. By the Rules of 1875, Order IX., rules, 9, 10, the writ of summons and warrant of arrest were both to be served by the marshal, but these rules were abrogated by Order IX., rules 9a and 10a, being rules 5 and 6 of the Rules of December, 1875, which are substantially the same in effect as the present rules.

(1) Order IX., rule 11. "In Admiralty actions in rem the warrant of arrest shall be served by the marshal or his substitutes, whether the property to be arrested be situate within the port of London or elsewhere within the jurisdiction of the Court, and the solicitor issuing the warrant shall within six days from the service thereof file the same in the Admiralty Registry."

(2) Order IX., rule 12. "In Admiralty actions in rem, service of a writ of summons or warrant against ship, freight, or cargo on board, is to be effected by nailing or affixing the original writ or warrant for a short time on the mainmast, or on the single mast of the vessel, and, on taking off the process, leaving a true copy of it nailed or fixed in its place."

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[He also referred to Clerk's Praxis, tit. 2 and 24, as to the old practice in regard to warrants of arrest.]

BUTT, J. I am much obliged to Mr. Bucknill for the argument which he has addressed to me. I have also derived assistance from memoranda which have been submitted to me by the registrar and the marshal. It is clear that before the separation of the warrant and the citation both were served by the marshal; they were then in fact one instrument. The present difficulty has arisen from the abrogation of the old rules, without there being any provision in the new rules as to how the writ of summons in an action in rem, which is substituted for the citation, is to be served. The recent practice has been, and is, to allow the solicitor or his clerk or some one other than the marshal to effect the service of the writ of the summons. It is, however, in my opinion doubtful if a man has a right to go on board a ship, and nail a writ of summons on the mast.

There is one thing which raises a strong inference, in favour of the existing practice. I refer to Order LXVII., rule 14 (1), which specifically states that when an instrument is served by the marshal the verification of the service shall be by his certificate and not by affidavit, but the same rule requires the verification by affidavit of a service by a solicitor. A broad distinction is, therefore, drawn between service by a solicitor and by the marshal. Bearing this in mind, and coming to Order XIII., rule 12, I find that it clearly contemplates the verification of the service of the writ of summons by affidavit. Therefore when this rule requires the verification of the service of a writ of summons by affidavit it appears to contemplate a service not by the marshal, but by a solicitor or by his clerk. Accordingly, though I am by no means free from doubt in the matter, I shall not interfere with the existing practice, and I treat the present as a proper affidavit of service.

Solicitors for plaintiffs: *Gregory & Co.*

(1) Rules of the Supreme Court, 1883, Order LXVII., rule 14: "The service of any instrument by the marshal shall be verified by his certificate. The service of any instrument by a solicitor, his clerk or agent, shall be verified by an affidavit."

E. S. R.

THE RIPON.

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March 2.

Collision—Humber Rules—Stern Light—Compulsory Pilotage—25 & 26 Vict. c. 63, s. 32—36 & 37 Vict. c. 85, s. 17.

The *R.* in charge of a tug was dropping stern foremost up the Humber with the tide, and was eventually brought athwart the tide to go into dock. The *R.* was exhibiting, in addition to the mast head and side lights, a white light from the main peak shewing astern, which had been placed there by order of the pilot who was by compulsion of law in charge of the *R.* The Rules for the Navigation of the River Humber, made by Order in Council in pursuance of 25 & 26 Vict c. 63, s. 32, incorporate the Regulations for Preventing Collisions at Sea. The *E.* coming down the Humber and the *R.* came into collision. At the hearing it was admitted that the *E.* was to blame:—

Held, that the *R.* was also to blame, for that as the Humber Rules were within the purview of 36 & 37 Vict. c. 85, s. 17, there had been, by the exhibition of a stern light, a breach of a statutory regulation, namely of art. 2, which it was impossible to say might not have contributed to the collision, and there was no circumstance to make a departure from the regulation necessary:

Held, also, that the light having been exhibited by order of the pilot, did not exempt the owner of the *R.* from liability, as the master should not have permitted an infringement of the regulations.

Action for damage by collision, brought by the owners of the steamship *Essex* against the steamship *Ripon*. It was alleged on behalf of the *Essex* that about 5.50 A.M. on the 16th of November, 1884, the *Essex* left the Humber Dock entrance at Hull, bound down the river, the weather being fine and clear, but very dark, and the tide the last of the flood. As the *Essex* was proceeding down river at a speed of from three to three-and-a-half knots an hour to the southward of mid channel, two white lights were observed about half a mile distant and almost two points on the port bow. Directly afterwards the green and masthead lights of a tug came in view at about the same distance, and bearing about one point on the port bow. The *Essex*, finding that the tug kept her course across the river and across her bows, eased her engines, and put her helm hard a-starboard, so as to pass under the stern of the tug; after the *Essex* had altered two or three points to port, her engines were stopped, her whistle was blown, and the tug was hailed, and she found that the tug had the *Ripon* in tow, which proved to be the vessel which was shewing the two bright lights, the tug then slipped her tow-line, the green

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light of the *Ripon* came into view as she drew across the *Essex*, and a collision occurred, the *Essex* striking the *Ripon* on the starboard side near the forepart of the bridge. It was further alleged by the statement of claim that the *Ripon* was improperly exhibiting two white lights, and not her green light, when she was first observed.

On the part of the *Ripon* it was alleged and proved that at the time of the collision she was by compulsion of law in charge of a duly licensed Trinity pilot for the River Humber. It was also alleged that about 4.15 A.M. on the 16th of November the *Ripon* got under way in Hull Roads, in charge of the pilot and in tow of a tug, and was dropping up the river head on to the flood tide. The *Ripon* and the tug had their respective masthead and regulation side lights duly exhibited. The *Ripon* had also a bright light exhibited aft from the main peak, which she had previously carried as an after riding light, and which was kept hoisted by the pilot's orders. That off the Victoria Dock Pier the *Ripon* hailed for orders as to the dock, and on receiving them to go to the Albert Dock, she was turned round so as to get athwart the river. While being thus without headway or sternway, and the tug heading up river, towing off the starboard bow, to bring her head round, the masthead and red light of the *Essex* were seen coming down the river; that the *Essex* approached at a rapid rate of speed, though the whistles of the *Ripon* and the tug were sounded, and as she neared the *Ripon* she was loudly hailed, and finally struck the *Ripon* with great violence on the starboard side. Rule 1 of the Rules relating to the Navigation of the River Humber (1), made by Order in Council in pursuance of the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 63),

(1) Order in Council, Dec. 23, 1881, rule 1: "All vessels as well sailing vessels as steamers (except dumb craft) while navigating or anchored or moored in the River Humber or in any part of the River Ouse at or below Goole, or in any part of the River Trent at or below Gainsborough, shall observe and obey the Regulations for Preventing Collisions at Sea set out in the first schedule annexed to an Order in Council made in pursuance of the Merchant Shipping Amendment Act, 1862, and dated the 14th day of August, 1879, and as varied and amended by an Order in Council made as aforesaid, and dated this 26th of August, 1881, with the exceptions and additions made in the following rules." (The latter do not refer to a vessel under weigh.) 7 P. D. 258.

s. 32, prescribes, by reference to the Regulations for Preventing Collisions at Sea, that a vessel under weigh shall carry the white masthead and coloured side lights.

The evidence in the case proved, as was admitted by counsel for the plaintiffs, that a good look-out was not being kept on the *Essex*, and that she did not slacken her speed as soon as she should have done.

Upon the conclusion of the evidence the Court was addressed as to whether the *Ripon* was also to blame.

Hall, Q.C., and *Bucknill*, for the plaintiffs. The Humber Rules being made under the authority of 25 & 26 Vict. c. 63, s. 32, and the *Ripon* not having complied with art. 2 of the Regulations for Preventing Collisions at Sea, which for the purpose of this case is a Humber rule, the *Ripon* must be held to blame by virtue of 36 & 37 Vict. c. 85, s. 17 (1): *The Lady Downshire.* (2) Further, there was nothing here to make a departure from the regulations necessary. Lastly, the owners of the *Ripon* are not protected by the fact that a pilot was on board by compulsion of law.

Phillimore, and *Kennedy*, for the defendants. The Court must find whether an infringement could by possibility have contributed to the collision, and here it could not: *The Bradalbane.* (3) There was here also a special circumstance to make a departure from the regulation necessary, for the *Ripon* was swinging across the river, and so was justified in exhibiting a second white light to warn vessels: *The John Fenwick* (4); *The Thomas Lea.* (5) If the *Ripon* is to blame, her owners are exempt from liability, because the fault was that of the pilot: *The Argo.* (6)

(1) 36 & 37 Vict. c. 85, s. 17: "If in any case of collision it is proved to the Court before which the case is tried that any of the regulations for preventing collision contained in or made under the Merchant Shipping Acts, 1854 to 1873, has been infringed, the ship by which such regulation has been infringed shall be deemed to be in fault unless it is shewn to the satisfaction of the Court that the circumstances of the case made departure from the regulation necessary."

(2) 4 P. D. 26.

(3) 7 P. D. 186.

(4) 3 Ad. & E. 500.

(5) 3 Mar. L. C. (N.S.) 260.

(6) Swa. 462.

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Hall, Q.C., in reply. *The Argo* (1) does not apply, the error there was strictly in regard to the navigation of the vessel.

BUTT, J. In this case it is admitted that the *Essex* is to blame. I have however to decide whether the *Ripon* is also to blame. I must hold that she is also in fault, though I do so with regret, because the Trinity Masters would have no hesitation in finding the *Essex* alone to blame if freed from the statutory law as they take it from me. My reasons for this decision are, that there is a statutory rule which I hold to be within the purview of s. 17 of the Merchant Shipping Act, 1873, and that is No. 1 of the Humber Rules (2), which incorporates the Regulations for Preventing Collisions at Sea. There is no doubt that the *Ripon* whilst under way was carrying a white globular light at the main peak, and this according to art. 2 (3) of the Regulations for Preventing Collisions at Sea, she should not have had. By keeping this light in this position the *Ripon* was infringing the rule in question. It has been argued that she was not, because she was turning in the river, and it was said that the light was under such circumstances allowable by the ordinary practice of seamen, or at any rate by the special circumstances of the case. It may be that the special circumstances would have warranted shewing a light over the stern of the *Ripon*, but they certainly would not warrant her in keeping up a riding light such as is prescribed for vessels at anchor. The most that the "special circumstances" mentioned in art. 24 of the Regulations would warrant would be the exhibition of such a light as is contemplated by art. 11 for the purpose of warning overtaking vessels, not the carrying of a fixed light forty feet above the deck.

Now, could this infringement possibly have contributed to the collision? It is impossible to say that it could not. It was said by those on the *Essex* that the light made them think that the *Ripon* was a vessel at anchor, and that therefore they might have taken some other measures had they not been thus misled. I

(1) Swa. 462.

(2) See note (1), p. 66.

(3) Art. 2. "The lights mentioned in the following articles numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers, from sunset to sunrise." Art. 3 provides that a steamship under way shall carry the green and red side lights, and a white masthead light.

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find as a fact that they did make this mistake; on the other hand I am also of opinion that the lights were not so misleading as to exonerate the *Essex* from blame for not keeping a better look-out. The remaining question is whether the owners of the *Ripon* are exempt from liability on the ground of compulsory pilotage. It is admitted that a pilot was in charge by compulsion of law, and it is proved that he ordered this riding light to be kept up. But I hold that the owners of the *Ripon* cannot be excused on this ground. It is clear that the master should not allow a light to be improperly carried so as to cause an infringement of the regulations. Suppose for example a pilot for some reason chose to order a green light to be carried on the port side, it would be impossible to say that this should be allowed by the master. The latter must consider for himself whether the law in respect to lights is being infringed, and if it is he must take steps to stop such infringement. I therefore must hold that both the *Essex* and the *Ripon* are to blame for this collision and that the owners of both vessels are responsible for the consequences.

Solicitors for plaintiffs: *Rollit & Sons.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

THE MEREDITH.

March 11.

Co-Ownership—Charter—Managing Owner—Commission.

A vessel was chartered for twelve months, and during the currency of the charter the charterers made default in certain payments and the charter lapsed. The vessel was rechartered by a voyage charter from K. to England. During the performance of this voyage the defendant purchased a share in this vessel:—

Held, on objection to the registrar's report in a co-ownership action, that the defendant was not liable to bear any of the losses occasioned by the time charter:

Held, also, that a part owner being the manager of a ship, is entitled to remuneration for his services, but that there is no fixed rate applicable.

OBJECTION to the report of the assistant registrar; the action was brought by the plaintiff, a part owner and late managing owner of the *Meredith*, against the defendant Ditchfeld, the owner of one sixty-fourth share of the *Meredith*, for the accounts of the

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Meredith, during the time that the plaintiff was managing owner, to be taken and the amount due from the defendant paid to the plaintiff. It appeared that in April, 1873, the *Meredith* was chartered for twelve months, Taganrog being her outward destination. The charterers making default in certain payments, the charter lapsed, and the plaintiff obtained a fresh charter for the *Meredith* from Kertch home to England. During the currency of this latter charter the defendant purchased his share in the ship.

The assistant registrar in taking the accounts had, inter alia, only charged the defendant in respect of losses arising out of the voyage charter above mentioned. The plaintiff appealed against this part of the report on the ground that the losses resulting from the time charter should in a proper proportion be borne by the defendant.

The plaintiff also, for managing the *Meredith*, charged commission at the rate of 2½ per cent. on the gross freight, amounting to 341*l.* 14*s.* 8*d.* on such gross freight; the assistant registrar had disallowed this sum and allowed 190*l.* on the gross freight, being at a lesser rate than 2½ per cent. The disallowance on the whole freight made only a difference of 2*l.* 14*s.* in respect of the defendant's share. Against this portion of the report the plaintiff also appealed.

Bigham, Q.C. (*L. A. Atherley Jones*, with him), for the plaintiff. The voyage charter was a mere incident to the fulfilling of the time charter; the ship had been sent out on the time charter, it lapsed, and the plaintiff was bound to get the ship home as advantageously as possible under the circumstances, so that when the defendant purchased his share the ship was in a manner performing the original charter, and the defendant should bear the losses arising from it. As to the charge of 2½ per cent. commission, this was a reasonable rate, and the assistant registrar should have allowed commission at such rate.

Bucknill, for the defendant, was not called on.

BUTT, J. I am clearly of opinion that there is no liability on the part of the defendant to contribute towards any loss arising

from the voyage on which the *Meredith* was engaged when he purchased his share in her, except in respect of that arising out of the voyage charter. The time charter was at an end before the defendant became a part owner, so that he cannot be liable in respect of anything arising out of it. Nor, indeed, am I quite satisfied that the defendant was liable to contribute towards the loss from the voyage charter, but as he does not appeal against this portion of the report it is unnecessary for me to decide this question.

The only result of my interfering with the report on the second ground would be to add a few pounds to the amount obtained by the plaintiff, though the point in dispute is not unimportant in principle. It is obvious that a manager is entitled to some remuneration, which is usually fixed by an agreement among the part owners. There is however no hard and fast practice as to the amount which a manager should receive. The assistant registrar and Mr. Young, who assisted him, have so much experience in these matters that unless evidence had been given before me clearly shewing that their decision was unreasonable, I should not interfere with the report on this point. No evidence at all has been given, and therefore this appeal must be dismissed with costs.

Solicitor for plaintiff: *R. Routledge.*

Solicitors for defendant: *T. Cooper & Co.*

E. S. R.

1885
Feb. 3.

WELDON *v.* WELDON.

Contempt—Attachment—Payment of Costs.

A respondent being in contempt for non-obedience of an order for restitution of conjugal rights, the petitioner applied for a writ of attachment against him:—

Held, that since the passing of the Matrimonial Causes Act, 1884, the writ could not be issued notwithstanding that the contempt existed prior to that Act:

Held, also that the writ could not issue for non-payment of costs. Application refused.

THIS was an application by the petitioner, Georgina Weldon, for a writ of attachment against her husband, William Henry Weldon, for non-obedience of a decree for restitution of conjugal rights made on the 13th of July, 1882.

The facts sufficiently appear in the judgment.

The petitioner appeared in person.

Inderwick, Q.C., and *Searle* for the respondent.

Cur. adv. vult.

SIR J. HANNEN (President). In this case a decree for the restitution of conjugal rights was pronounced on the 13th of July, 1882, and a copy of that decree having been served on the respondent and not obeyed, the petitioner, on the 27th of November, 1883, obtained an order for a writ of attachment against him. A further application was made by the petitioner that the writ should issue, and on that application an order was made delaying it for a fortnight. In the meantime proceedings by way of appeal were taken by the respondent, and pending his appeal the issue of the writ was by further order suspended. Subsequently the appeal was withdrawn, and therefore the case stood precisely as if Mr. Weldon had been contumacious—had been in default for non-compliance with the order of the Court during the time which had elapsed since it was to take effect. Mrs. Weldon has now applied for an order that the writ of attachment should issue, and the application is answered by reference to the Matrimonial Causes Act, 1884, 47 & 48 Vict. c. 68, which enacts that "From and

after the passing of this Act a decree for the restitution of conjugal rights shall not be enforced by attachment," and, further, that another process should be substituted for such writ. In answer to that Mrs. Weldon contends that the Act does not apply to her case, inasmuch as it is not retrospective.

When the question was argued before me, I was of opinion that the Act applied to the proceedings in this case, as it would to those in any other which might be commenced after the passing of the statute. It is to be observed that the statute uses the most general words, viz., that "after the passing of the Act a decree for the restitution of conjugal rights shall not be enforced by attachment." The decree here was one for the restoration of conjugal rights, and therefore it comes within the very language of the Act. If it had been the intention of the legislature that the section should apply only to future cases, then the only appropriate language would have been to say that no decree for the restitution of conjugal rights, pronounced after the passing of the Act, should be enforced by attachment; but no such words have been used, and in my opinion if Mr. Weldon had been in custody under the writ of attachment, he would, on the passing of this Act, have been entitled to his discharge just as if he had complied with the order by taking his wife back.

The only doubt I entertained was whether, as a matter of fact, Mr. Weldon was in contempt and could be treated as entirely free by the passing of this Act; whether, on the supposition of his having been in prison, he could have been entitled to come here and ask to be released, or whether some further act, and not only a submission in words, as contained in the affidavit filed by him, would not have been necessary, i.e., whether he would not have been bound to shew that he had complied with the further order of the Court which was made at the time of the order for an attachment—namely, an order for the payment of costs.

Upon this question no information has been furnished to me either on the one side or the other; but I find that in the Chancery Division, where the question of the effect of attachment for contempt in non-compliance with an order of the Court has been more frequently before the judges than here, the question has been considered by two at least of those learned judges. In the

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case of *Jackson* v. *Mawby* (1) the defendant was in contempt for not having answered a bill filed against him as a defaulting trustee, and an attachment was issued against him and he was taken into custody. He appeared in court and filed an answer, and a motion having been made to discharge him from custody, the question was raised whether he could be discharged before he paid the costs; and Hall, V.-C. decided that the Debtors Act of 1869 applied, and took from the Court the power of making the payment of costs a part of the order. In the other case, *In re M.* (2), Bacon, V.-C. came to a different conclusion, but the facts were entirely different. A person having been committed for breaking an order of the Court, the case of *Jackson* v. *Mawby* (1) was referred to; but Bacon, V.-C. was of opinion that it did not apply, and in that opinion he was confirmed by a Court of Appeal, as the contempt was one of a different nature, to which the Debtors Act did not apply.

As I have stated on a previous occasion, this case is not one in which any discretion is vested in the Court; and in that respect it differs from the case decided by Bacon, V.-C. It is a case in which the writ of attachment granted only purports to carry out the rights of the parties applying, and it stands on precisely the same ground as a writ of fi. fa., which the Court is bound to issue in furtherance of the rights of a person who has obtained a judgment. Therefore the position of Mr. Weldon since the passing of the Act of last session is the same as if he had so far purged his contempt as would result from his having taken his wife back. The question of costs is not one with which the Court is entitled to deal by attachment; it is not entitled to allow Mr. Weldon to be taken into custody for the mere purpose of compelling him to pay the costs. These could be secured in this case by the mode by which they were secured in the case before Hall, V.-C.—by making an order that Mr. Weldon pay all the costs, including the costs of this application.

Petitioner in person.

Solicitor for respondent: *J. Neal.*

(1) 1 Ch. D. 86; 45 L. J. (Ch.) 53. (2) 46 L. J. (Ch.) 24 (C.A.).

R. A. P.

M. otherwise D. *v.* D.

1885
March 5.

Nullity—Impotence—Delay—Sincerity.

At the end of seven years' cohabitation a marriage had not been consummated through the impotence of the alleged husband. The alleged wife subsequently cohabited with another man, and upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him and he a suit for dissolution of marriage against her:—

Held, that the proof of impotence being clear her conduct did not shew such a want of sincerity as to deprive her of her right to have the marriage annulled.

When the impotence is undoubted mere delay is not sufficient to disentitle the injured party to relief.

This was a suit for nullity of marriage brought by an alleged wife by reason of the impotence of the alleged husband.

Inderwick, Q.C., and *Searle*, appeared for the petitioner. The respondent has confessed that after seven years' cohabitation the marriage remained unconsummated, and the evidence shews that the respondent is still incompetent.

Russell, Q.C., and *Pritchard*, for the respondent. The report of the inspectors shows no defect in the respondent, and that the petitioner is not a virgin. Though he was unable to consummate the marriage at first, the petitioner when he was competent refused to permit him because she had then cohabited with another man. She would not now have complained if the respondent had not discovered her misconduct. On the latter ground alone she is not entitled to a decree: *Stagg f. c. E.* v. *E.* (1); *H. f. c. Castleden* v. *Castleden* (2); *Pollard* v. *Wybourn.* (3)

Inderwick, in reply, as to delay and want of sincerity, referred to *Anon.* (4)

The other facts sufficiently appear in the judgment.

Cur. adv. vult.

Sir J. Hannen (President). The parties to this cause were married on the 9th of June, 1874. With the exception of a few days they lived together without interruption until the autumn

(1) 3 Sw. & Tr. 240.
(2) 1 Sw. & Tr. 605; 9 H. L. C. 186.
(3) 1 Hagg. Ecc. 725.
(4) 1 Deane, 299.

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of 1880, sleeping in the same room. It is admitted by the respondent that the marriage has never been consummated, notwithstanding frequent attempts on his part to do so. The lady alleges that after the autumn of 1879, when they were at Athens, the respondent never made any attempt to have intercourse with her. The respondent, on the other hand, states that he continued his fruitless efforts until he left for India in the autumn of 1880. I am of opinion that the evidence of the petitioner on this point is correct. She gave her evidence in a manner which has satisfied me of her truthfulness. The respondent, on the other hand, has not created in my mind the same confidence in his testimony. It appears, therefore, that for a period of six or seven years the respondent has been totally unable to perform the duties of a husband, and this leads to the presumption that he was incurably impotent. He has given a very full description of the nature of his incapacity, which he attributes to what he terms a "fast life" before marriage. I prefer not to put into words the description which he has given of his condition, but I do not think that it is altogether without bearing on some of the questions in the case. The petitioner followed her husband to India in the early part of 1881, but as he had been ordered away on some distant service they did not meet till June of that year. The lady had been staying at Umballah and came to Murree to join the respondent. He alleges that on the night of their meeting they slept in the same room, and that he then informed her that he was quite capable of consummating the marriage, but that she refused, attributing to her a coarse expression, which she denies having used, and which I do not believe she did use. He does not assert that he did more than kiss her, and she states that though she was quite willing to yield to his embraces he made no approach at all to intercourse either by words or acts, saying that he was no better, and that the climate of India had not strengthened him. Confirmation of her statement that she did not deny him intercourse on this occasion is afforded by a letter of the 2nd of May, 1884, which the respondent wrote to the petitioner's brother disclosing the fact that the marriage had never been consummated, in which he says, "This is now immaterial, as Carrie told me at Simla in 1881 that she would not sleep with

me again, so we now occupy separate bedrooms." They were not in Simla till some time after they had met at Murree.

I come to the conclusion, therefore, that the lady did not object to intercourse, but that the sole cause of its not taking place at Murree was the continuance of the respondent's incapacity, which had existed during the seven years they had slept together, and I entertain no doubt that the respondent is permanently impotent. But it is contended for the respondent that the petitioner is not entitled to a decree of nullity on the ground of his impotence by reason of the time which has elapsed since the marriage, and because it is said that she is not "sincere" in prosecuting this suit. With regard to the delay, that has never by itself been held to be a bar to a suit of this kind. In the case of *B.* v. *M.* (1), Dr. Lushington says, "No instance has been mentioned to me in which a judge has said a particular number of years constitutes a bar, and I cannot discover that when a suit like the present has terminated unfavourably to the promoter there were not other circumstances besides the question of time co-operating."

In *Pollard* v. *Wybourn* (2) Dr. Lushington granted a decree after twelve years. In *Sparrow* v. *H.* (3) the wife did not bring her suit for sixteen years after marriage—yet Dr. Lushington granted the decree.

In *Castleden* v. *Castleden* (4), where the parties had lived apart for twenty-one years, it was held that lapse of time was not an absolute bar, but that when there had been great delay there must be strict evidence of the impotency which there was not in that case, and Lord Campbell added "It seems to me that she does not now sue on account of what is supposed to be the general motive for a woman bringing such a suit of nullity of marriage, but she brings this suit merely because he has ceased to support her. That is the reason, and the only reason, why the suit is instituted."

With regard to the charge of insincerity made against the petitioner, I feel the difficulty which has been expressed by Dr. Lushington in the *Anonymous case* (5), in defining what

(1) 2 Rob. Ecc. 585.
(2) 1 Hagg. 725.
(3) 3 Curt. 16.
(4) 9 H. L. C. 186.
(5) 1 Deane, 299.

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combination of circumstances constitutes such insincerity as would deprive a woman of the right to have a pretended marriage with a man proved to be impotent declared null.

The "insincerity" which is imputed to the petitioner is said to arise out of an immoral connexion existing between her, and Colonel G. It becomes necessary therefore to examine the facts which have a bearing on this branch of the case. Colonel G., a distant relation of the respondent, was a passenger on the ship in which the petitioner went to India. They afterwards met at Umballah, and Colonel G. accompanied her when she left that place to meet the respondent. The petitioner and respondent afterwards visited Colonel G. at Umballah, and the respondent there found a letter from his wife to Colonel G. couched, as respondent says, in affectionate language, and referring "lightly" to himself. He spoke to her on the subject, and she stated that it had been written in a moment of thoughtlessness, and asked his forgiveness. The letter was torn up and they were reconciled. When the petitioner returned to Europe in September, 1882, Colonel G. returned in the same ship, and they both landed at Genoa with other passengers and stayed at the same hotel there. In England they were much together and stayed in the same house at Richmond, and went by the name of Captain and Mrs. Dickin. The petitioner's brother wrote to inform the respondent of the reports he had heard of the petitioner's conduct, and in answer to this communication the respondent wrote the letter already referred to, in which he stated that the marriage had never been consummated. This was the first notice the petitioner's family had of the extraordinary relations of the petitioner and respondent. The respondent returned to England in March, 1884, and joined his wife in London, and they then went to Torquay to the respondent's mother, where they remained a month, but they always occupied separate bedrooms.

The charges which had been made against the petitioner with regard to Colonel G., and the relations of the respondent and petitioner, were the subject of discussion between them, but they differ as to what passed. The lady alleges that she informed the respondent that she wished to have their marriage annulled, and asked him not to oppose it; that he at first said that he would

not, but that twenty minutes after he returned and said that he should oppose it, but that if she liked to go away with Colonel G. he would bring a suit for divorce against her.

The respondent at first denied that there had been any conversation as to the petitioner taking proceedings for nullity, but from his answers in cross-examination I have no doubt that the respondent did, in the first instance, say that he would not defend a suit for nullity, but that he afterwards withdrew this and expressed his determination to sue for a divorce.

This is referred to in a letter from the petitioner to the respondent, in September, 1884: "I ask you again for both ourselves let us be free and without opposition; do keep to the honourable decision you first came to at Torquay, and thus prevent my having to state many things concerning you and our unhappiness which I have hitherto never mentioned."

After the petitioner and respondent had stayed together some time at Torquay, she went to her friends, with respondent's concurrence, in order to consult with them as to the course she should take. It is evident that under the influence of her friends her feelings fluctuated. At one time (2nd of June) she wrote to him, "I have only now been able to come to any decision, which is, that I will join you and give you another chance of being a husband. I have waited and waited for years in consequence of your frequent assertions that all would come right, and, as you know, I have waited in vain."

At another time some negotiations for a deed of separation were opened, but were not successful, and ultimately, after the petitioner had for the first time consulted a solicitor as to her legal position and rights, this suit was instituted.

Upon these facts it is contended for the respondent that the petitioner is not sincere in taking these proceedings in this, that her object is to save herself from the exposure of her misconduct with Colonel G. It is to be observed, however, that the taking these proceedings could not save the petitioner from the exposure of the facts of her relation with Colonel G. She might indeed have saved herself from that exposure by accepting a deed of separation, but this she rejected. By bringing this suit, however, the petitioner has established that she was not really and

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truly the wife of the respondent, and thus she places her conduct with regard to Colonel G. in a more favourable light. I can see nothing reprehensible in this motive influencing her, if, in fact, it did influence her, to bring this suit. This would only shew an additional reason for her really desiring to get rid of the mockery of a marriage at present subsisting, and would tend to establish the sincerity, not the insincerity, of these proceedings. I cannot entertain a doubt that she is perfectly sincere in desiring that this marriage may be annulled, first, that she may be set free from an unnatural and repulsive connection with the respondent; secondly that she may be able to marry some one else; and lastly, that her conduct may be judged with a knowledge of the fact that the respondent was incapable of being a husband to her.

For these reasons I am of opinion that the petitioner has established her case, and I pronounce a decree nisi for nullity, with costs.

Solicitors for petitioner: *Humphreys & Sons.*
Solicitors for respondent: *Lewis & Lewis.*

R. A. P.

1885
March 10.

DURHAM *v.* DURHAM.
HUNTER *v.* EDNEY, otherwise HUNTER.
CANNON *v.* SMALLEY, otherwise CANNON.

Nullity by Reason of Insanity.

The burden of shewing that the respondent was insane at the time of the marriage lies upon the party asserting it, and the Court has to determine whether the respondent was capable of understanding the nature of the contract, and the duties and responsibilities which it creates, and was free from the influence of morbid delusions upon the subject.

This was a petition by the Right Hon. the Earl of Durham praying for a declaration of nullity of his marriage with Ethel Elizabeth Louisa, Countess of Durham (sued as Ethel Elizabeth Louisa Milner), by reason that at the time of the celebration of the ceremony she was of unsound mind and incapable of contracting marriage.

The respondent appeared by her brother, Edward Milner, and denied the insanity.

The parties were married on the 28th of October, 1882, at St. Peter's Church, Eaton Square, Pimlico, and it was admitted that the respondent was at the time of the hearing of the cause hopelessly insane. The other facts fully appear in the judgment.

Sir F. Herschell, S.G., Inderwick, Q.C., and *Bayford*, for the petitioner. The respondent's conduct was such before and immediately after the ceremony of marriage as to shew that she never appreciated and realized the duties and obligations of a wife, and all the symptoms characteristic of her mental state before and immediately after the marriage, render no other explanation possible than that of unsoundness of mind.

Sir H. James, A.G., Clarke, Q.C., and *Pollard*, for the respondent. The respondent not only knew the contract she was entering into with its duties and obligations, but gave her consent to it. The Court views with extreme jealousy applications of this kind, and requires the strictest proof. Suits by reason of insanity are rare, and with the exception of *Hunter* v. *Edney* (1), a case like the present, i.e., where the suit has been brought, not on behalf of the person whose insanity is in question, but by the other party to the contract, is without precedent: *Turner* v. *Meyers* (2); *Portsmouth* v. *Portsmouth* (3); *Browning* v. *Reane* (4); *Hancock* v. *Peaty* (5); *Harrod* v. *Harrod* (6); *Jenkin* v. *Morris* (7); *Wilkinson* v. *Wilkinson* (8); *Banks* v. *Goodfellow*. (9)

Cur. adv. vult.

SIR J. HANNEN (President). The question I have to determine in this case is whether the respondent, at the time of the marriage on the 28th of October, 1882, was of sound mind, so as to be able to enter into the contract of matrimony.

All the authorities bearing on the subject have been brought to my notice, but I do not think it necessary to review them, as I

(1) Post p. 93.
(2) 1 Hagg. Con. 414.
(3) 1 Hagg. Ecc. 355.
(4) 2 Phillim. 69.
(5) Law Rep. 1 P. & D. 335.
(6) 1 K. & J. 4.
(7) 14 Ch. D. 674.
(8) 4 Notes of Cases, 295.
(9) Law Rep. 5 Q. B. 549.

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am of opinion that every case of this kind must be decided upon its own facts. Nor do I consider that it would be useful to borrow from my predecessors, or to attempt myself to form any exact definition of what constitutes soundness of mind. I accept for the purposes of this case the definition which has been substantially agreed upon by the counsel to whom I have to express my obligations for the very able assistance they have given me, namely, a capacity to understand the nature of the contract, and the duties and responsibilities which it creates. It is to be observed, however, that this only conceals for a moment the difficulties of the inquiry, for I have still to determine the meaning to be attached to the word "understand." If I were to attempt to analyse this expression, I should encounter the same difficulties at some other stage of the investigation with reference to some other phrase, and I should still have to determine, on a review of the whole facts, whether the respondent came up to the standard of sanity which I must fix in my own mind, though I may not be able to express it. I may say this much in the outset, that it appears to me that the contract of marriage is a very simple one, which does not require a high degree of intelligence to comprehend. It is an engagement between a man and woman to live together, and love one another as husband and wife, to the exclusion of all others. This is expanded in the promises of the marriage ceremony by words having reference to the natural relations which spring from that engagement, such as protection on the part of the man, and submission on the part of the woman. I agree with the Solicitor General, that a mere comprehension of the words of the promises exchanged is not sufficient. The mind of one of the parties may be capable of understanding the language used, but may yet be affected by such delusions, or other symptoms of insanity, as may satisfy the tribunal that there was not a real appreciation of the engagement apparently entered into. It seems to me that the determination of the case must depend upon whether I come to the conclusion that there were such symptoms of insanity manifested by the respondent on the 28th of October, 1882. In considering this question, I think it cannot be regarded, as the Attorney General contended, as though it had arisen on a will made by the respondent immediately after

the wedding, speedily followed by the respondent's death. I am bound to take into consideration the fact that she has now become manifestly insane. I must look at the nature of that insanity, and form an opinion from the general history of the case, whether it is recent or sudden in its inception, or whether it has been of slow growth, and whether it had begun before the marriage and had by that time reached a stage which incapacitated the respondent from entering into the contract of marriage.

The argument on the part of the petitioner is that the symptoms which were observed in April, June, and July of 1883, by the medical men, whose opinion that she was then insane has been so fully justified by the event, were all continuously manifested by the respondent from a time anterior to the 28th of October down to that day, and from that day until she was examined and found to be insane. Let us see what it was that these medical men observed. Dr. Matthew Duncan says that he first saw Lady Durham on the 22nd of April, 1883; that he was consulted for certain functional derangements. That to his questions she gave no answers, or only "I don't know," and his conclusion is, "at that time she only exhibited imbecility." That he saw her afterwards eight or ten times before 1884, and that "she had more decided marks of insanity"—more marked insanity—not mere imbecility, but that she continued throughout to answer only "Yes" and "No," or "I don't know." In cross-examination, he says that he was "sure that her condition was not recent, and that he should think that during her girlhood and young womanhood she had always been imbecile; indeed he had been told so." Dr. Playfair first saw the respondent on the 30th of June, 1883. He was consulted on the question whether she was suffering from hysteria or not. He came to the conclusion that her symptoms were not those of hysteria, but of unsound mind, but he added that he could not give an opinion as to its duration. Dr. Blandford first saw her on the 2nd of July, 1883. He says that she stood the whole time he saw her, that he could get no answers to his questions except "I do not know;" that she may have said "Yes" and "No," but that practically he got no answer to his questions, and that he came to the conclusion that she was of unsound mind—this witness does not use the

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word "imbecility"—and he states generally that, after having heard the evidence, he does not come to the conclusion that she first became insane after the marriage.

I assume that there was something in the manner of the respondent which justified these gentlemen in coming to the conclusion that she was imbecile or insane at the times they have respectively spoken to. I now proceed to examine the evidence to see whether her condition was the same previous to her marriage.

I must at once say that there is nothing in the evidence to warrant the opinion which Dr. Matthew Duncan formed that she had been imbecile from her childhood and early womanhood, and he must, I think, have allowed his judgment to be unduly affected by the undisclosed person who told him that that had been her condition. I think it appears from the letters of the respondent that she was a person of low intellectual powers, but she was capable of receiving the ordinary education of young ladies of her class. She acquired some accomplishments, and took part in private theatricals. She appears to have inspired feelings of affection in ladies of her own age, whose acquaintance she made after entering society in 1879. She was everywhere received and treated as an ordinary person, at any rate until her engagement. Her grandfather, the Archbishop of Armagh, states that he regarded her as the most sensible of his granddaughters, a statement quite consistent with her intellectual powers being feebler than those of her sisters, but entirely excluding the idea of her being imbecile. It is clear that she was of a shy and nervous temperament, which impaired her powers of expression and impeded the flow of her ideas in the presence of those whom she did not know intimately, but it is equally clear that she was capable of forming a judgment on her own condition. The evidence of Mr. Curzon is of great value on this point. He states that in 1879 he had a conversation with her in which she talked of the prevailing impression about her shyness, and lamented the fact that people took that shyness to mean stupidity. She expressed herself as being very sensitive in society, but not as really being as stupid as she was supposed to be. Mr. Curzon was evidently one of those who by his own manner was able to

inspire the respondent with confidence, and, to use a common expression, "draw out" her conversational powers. Shyness of the degree and kind which the respondent lamented has existed in many persons of a much higher intellectual capacity than that of Lady Durham.

I do not think it necessary to go through the evidence of the numerous witnesses of all classes who have stated that the respondent, though shy, was perfectly sane and intelligent down to the time of her engagement, because that engagement is itself the strongest possible testimony in her favour. Lord Durham had ample opportunity of forming an estimate of the mental qualifications of Miss Milner. He was no doubt in the first instance attracted by her beauty, but in addition to frequently meeting her in society, he spent nearly a week with her at Ascot in the summer of 1882, and he came to the conclusion that she was a person whom he desired to obtain as his wife—Lord Durham does not appear to have been one of that class of persons of whom Milton says that they are "least practised in these affairs," but the following words of "The Doctrine and Discipline of Divorce" are no doubt applicable to this case: "Who knows not that the bashful muteness of a virgin may ofttimes hide all the unliveliness and natural sloth which is really unfit for conversation." This unfitness for conversation, however, does not constitute imbecility or insanity. I have said that the fact of Lord Durham engaging himself to the respondent is the best evidence that she exhibited no sign of insanity at that time, but I must correct the expression —I think that there is even better evidence of the fact. The Archbishop of York, after stating that during the respondent's visits to his house, in January and February, 1882, he had opportunities of observing her, says that she talked quite freely to him —that her manner was always perfectly composed and simple, and there was nothing to mark her out from other people in that respect, but that she was a shy girl, no doubt, and he added that the respondent formed a great intimacy and friendship for his daughter, Miss Zoe Thompson, who was very intimate with Lady Carmarthen, and that from January, 1882, there was a third added to the alliance, namely Miss Milner. Lady Carmarthen

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(Lord Durham's sister) stated in her evidence that, on the night of Lady Durham's arrival at Lambton after the engagement, she (Lady Carmarthen) went to Mrs. Gerard's room and said, "I am so glad, this is what I have been hoping for for the last year," and that that expression conveyed her real feelings. Lord Durham's judgment may have been obscured by his passion, but Lady Carmarthen's judgment was free from any such disturbing influence. She could only have had the happiness of her brother in view, and after the opportunities afforded by intimate acquaintance she was not merely content with but hoped for her brother's union with the respondent. It appears to me, therefore, impossible to contend with success that she presented up to the time of her engagement any sign of want of sanity to those who had the best means of judging of her mental capacity and the greatest interest in estimating it correctly.

I now proceed to consider the evidence relied on to shew that after her engagement she did exhibit symptoms of unsound mind.

The first thing relied on did, indeed, precede the actual engagement, which occurred on Saturday, the 19th of August, 1882. On the day before, Miss Milner's dress, in some way or other, took fire, and she sustained a burn on her chest. The respondent made little of it, changed her dress and rejoined the company without complaining of pain. This was only referred to in the opening speech of the Solicitor General as evidence of her insensibility to pain, which, it was said, was not without a bearing on her mental condition. No evidence, however, has been given to shew that insensibility to pain is an accompaniment of insanity. But the incident has in the course of the case been relied upon as shewing that the respondent attempted self-destruction by attempting to set her dress on fire. This suggestion is based on a statement made by the respondent since she has been undoubtedly insane, that she set fire to herself. This statement cannot, of course, be entirely rejected merely because she was insane when she made it. I have known instances of persons of unsound mind giving evidence in courts of justice of facts within their knowledge, and their statements have been acted upon. But it is evident that statements made in such circumstances

must be received with caution, and they must be corroborated by, or be consistent with, the other evidence of the facts in question. Now that the facts have been fully investigated, it appears to me that the respondent's statement is not corroborated by, but is inconsistent with, the evidence of all those who can speak on the subject. The respondent appears to have gone upstairs on an errand for her sister. She herself gave the alarm by ringing the bell. She had herself, before the arrival of her servant, effectually extinguished the flames. She said at the time that she had dropped a match which had set light to the bottom of her dress; that the fire ran up, and that she had put it out with her towel before the flames had done more than burn her at the parting of her dress. There is absolutely nothing to throw any doubt on this account of the accident, except the subsequent statement I have referred to, made when the respondent was admittedly insane. I may add that the suggestion that the burn must have caused great pain, does not appear to be borne out by the evidence of the maid, who states that it only raised a small blister, which subsided in a day or two leaving only a redness of the skin. It appears to me, therefore, that the evidence altogether fails to support the theory that the respondent intentionally caused this injury to herself.

The next point in order of date which it is contended shews insanity is thus stated by Lord Durham: He says that after he had made the proposal, and had received an answer which he construed in the affirmative, he upbraided her for her behaviour to him, at least for her silence and reticence, to which she replied, "Oh, there is something dreadful and awful I ought to tell you." It is argued that this is evidence of delusion, since it is incredible that there can have been anything in her past career to which the epithets "dreadful" and "awful" could be properly applied. Lord Durham could not persuade the respondent to say to what she referred. If she had stated what it was, we could have formed an opinion whether there was anything irrational in her language. This unfortunate lady cannot now give any explanation, and we are bound not to assume on mere conjecture that there could not have been a reasonable meaning in her words. We must

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carefully consider all the proved facts and see whether they do not supply a clue by which to find a probable interpretation of what she said.

This leads me to a branch of the case upon which I may have to make remarks which may cause pain. I shall do so with regret, but it is part of my duty to consider how far the conduct of the parties and others has a bearing upon the question I have to determine, and I must not shrink from stating the opinion I may form, if that statement is necessary to make clear the grounds of my decision.

The evidence satisfies me that the respondent's affections had been fixed upon a gentleman whom she knew before the petitioner. It is clear that that person was attached to her and that they understood one another's feelings. I infer this from that gentleman having made known to Mr. Edward Milner his desire to marry the respondent. Mr. Milner disapproved of this connection on account of that gentleman's want of means. The respondent was annoyed at her brother's interference, and expressed the hope that he had not said too much in opposition to that gentleman's wishes. Mrs. Gerard says that she would have endeavoured to bring about the marriage if she had thought her sister's happiness depended upon it, but that she was satisfied with the respondent's statement that a marriage with a poor man did not answer. Believing, as I do, that the respondent's affection still continued fixed on another man, I think that she did Lord Durham a great wrong in becoming engaged to him, and that she was conscious of this. Lord Durham naturally complains that when his proposal had been accepted, Miss Milner did not return his kiss, and that neither then, nor at any other time, did any word of endearment pass her lips. If the kiss and the words of endearment had been given to another might she not feel that there was something which she ought to disclose to Lord Durham? and though the words "dreadful" and "awful" may seem to some exaggerated for such a matter, they may well have been used by a sensitive girl, whose conscience was not easy on the subject. It is further to be observed that it is not unusual at the present day for young men and women to apply such terms as

"dreadful" and "awful," without any nice consideration of their fitness.

It is further said that the respondent's coldness and reticence to Lord Durham after their engagement is so unnatural in the circumstances that it is evidence of a deranged intellect. Lord Durham states that she avoided walking near him, shrinking from him, and walking on the grass borders of the paths at Lambton in order to keep away from him. If she had been sincerely in love with him such conduct would have been unnatural, and I can only wonder that Lord Durham could persuade himself that the respondent cared for him, with such strong proofs to the contrary. Lord Durham says that he was to some extent reassured, by a statement made shortly before, by Mrs. Gerard, that her sister's coldness to him arose from her love. I am by no means satisfied that this was Mrs. Gerard's belief, and it appears to me that Mrs. Gerard was certainly to blame in stating to Mr. Knollys, as she did in July of 1882, that her sister was in love with Lord Durham. I think it highly probable that this statement did stimulate Lord Durham to make his proposal, and thus Mrs. Gerard's device to bring about a match which she thought advantageous has assisted to wreck the happiness of two lives.

I do not think it necessary to examine in detail the other peculiarities in the behaviour of the respondent after the engagement—her silence, want of interest in Lambton and its surroundings, her coolness to Lord Durham's family and friends and his old servants. Those are ordinary evidences of want of affection, and many of the trifling circumstances which are relied on are only signs that she was not happy. If I am right in the view I take of the state of her feelings, the respondent did a further wrong to the petitioner in continuing her engagement when she found that she could not love him. But, while everything in her conduct seems to me to be accounted for by want of affection for Lord Durham, I can find no proofs of want of sanity in anything she did in reference to her approaching marriage. She entered into all the arrangements for that event in a methodical and rational manner, and I am much impressed by the evidence of

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her sister, Miss Emily Milner, who has given the details of the respondent's life during the weeks which preceded the marriage. The respondent's tender farewell to her sister Emily, expressing a fear that she had not been a good sister to her; her promise to do her best in the future to be of use to her sister, her gift to her of her old jewellery, her directions to her maid at The Durdans—all indicate a calm and collected and rational mind. I pass over the incidents of the wedding-day. The Solicitor-General has admitted that no inference of unsoundness of mind can fairly be drawn from the shyness, nervousness, and want of presence of mind of a young lady on such an occasion. That the respondent exhibited these peculiarities at other times I do not doubt, as, for example, on the visit to the Duke and Duchess of Abercorn; but on none of these occasions did her manner suggest to any one that she was not in possession of her reason. I come to the conclusion that the petitioner has failed to establish that the respondent exhibited any symptom of insanity down to the time of the marriage, but, as I have already said, the subsequent incidents cannot be disregarded.

I regret to be obliged to state my opinion that Lord Durham did not, on the third night after the marriage, shew that tenderness and consideration which the condition of his bride demanded. His threat to leave her and tell her mother of what he considered her waywardness, was calculated in the highest degree to agitate her and disturb her nervous temperament. Again, we must remember that we cannot have the lady's account of what passed between herself and her husband during the first days of their union; but his own statement shews that he little knew how to win his young wife's affection by gentleness and patience. Lady Durham appears, from her letters to her mother and sister, to have professed to be happy and contented, but her health evidently gave way soon after her marriage; a medical man was consulted, and in February, 1883, Sir William Gull was called in. He states positively that no suggestion was made to him by Lord Durham that Lady Durham was affected in her mind. He says that he examined her condition during an interview of twenty or twenty-five minutes; that she was depressed in health,

languid, and with a feeble pulse; that he prescribed for her bodily ailment, and observed no trace of mental disease. He adds that he does not think that any trace of mental disease could have escaped his notice and observation. Soon after this the petitioner and respondent went to Cannes, and Miss Annie Saltmar, the respondent's maid, who had been with her from her childhood, states that in the first week they were at Cannes she noticed a change in her mistress; she appeared very ill and her manner changed very much, that whereas she had always been most kind and considerate to her, she became very cross and irritable, and we learn from Lord Durham that the respondent wished to dismiss Saltmar at Cannes without any reason. He also says that she there walked out by herself and did not return until after sunset. This wandering has been repeated many times since. All the witnesses who had opportunities of comparing her condition before and after the visit to Cannes state that they observed a marked change in her after that time. Mrs. Gerard says after Lady Durham returned from Cannes she looked extremely ill and she seemed more distant to her, and that she was not so affectionate as she had been. Miss Emily Milner says that in April, 1883, she was horrified at the change in her sister. She was excessively cold to her, though they had previously been on the most affectionate terms. Lord Gerard says that after the return from Cannes there was a most extraordinary change in her. She seemed in the most deplorable spirits and very distant as well. Miss Saltmar's evidence to the same effect has already been referred to. Mr. Curzon says that in the summer of 1883, he observed an extraordinary change in her. Mr. Leeson, who had been much in her society, says that after the return from Cannes he noticed a very considerable change in her manner, and that he had seen nothing in the slightest degree resembling it before her marriage. Other evidence to the same effect was given. Lady Carmarthen also gave evidence which I think tends to shew that no unsoundness of mind had arisen before the journey to Cannes. She states that in February, 1883, Lady Durham said that she was very melancholy, and that she was subject to melancholia, that she kept on

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imagining things that made her unhappy, "that it was the kind of thing that sent people mad." I attach great importance to that statement as shewing that she was able at that time to reason about her condition, and therefore that, though she felt that her mind had a tendency to insanity, it had not yet given way as it did shortly after.

It results from this evidence that the respondent's appearance, manner, and behaviour, after the visit to Cannes, when Dr. Duncan, Dr. Playfair, and Dr. Blandford saw her, were essentially different from what they were before she left England. I find it impossible to doubt the concurrent testimony of so many witnesses, and it is to be observed that this change was in its nature such as commonly arises from insanity. It manifested itself in a perversion of the affections, she became cold, distant, and unkind to those whom she had formerly loved. Add to this, that she was seen by a most eminent medical man, Sir William Gull, before she went to Cannes, and he observed no sign of insanity in her. No doubt the general characteristics of her manner—shyness and nervousness—were the same at both epochs, but there was the all important difference of mind and no mind, so that at the one time she appeared, not only to her friends and relatives, but also to a physician of the greatest experience, to be of sound mind, while at the other time she appeared to those friends and relations to have undergone a change to a condition which the doctors recognised as insanity.

I come, therefore, to the conclusion that the symptoms which the three medical men who have been called for the petitioner observed did not exist before the respondent went to Cannes, and I draw the inference that the change in her mental condition from sound to unsound mind occurred at that place, and had not arisen at the time of the marriage. I therefore find that the petitioner's case is not established, and I dismiss the petition with costs.

Solicitors for petitioners: *Frere, Forster, Frere, & Cholmley.*
Solicitors for respondent: *Meynell & Pemberton.*

R. A. P.

HUNTER *v.* EDNEY, OTHERWISE HUNTER. 1881 *Dec.* 16.

THIS was a petition by a husband for nullity of marriage by reason of the respondent's insanity at the time of the marriage. An answer had been filed on her behalf denying the insanity, but she had instructed her counsel that she did not wish to oppose the petition. She was, however, in court at the hearing of the cause, and by the directions of the Court was, with her mother, examined as a witness.

Bayford, appeared for the petitioner.
Searle, for the respondent.

The petitioner was an organ builder, and the respondent was the daughter of an innkeeper at Horndean. At the time of the marriage he was twenty-five and she twenty-three years of age.

The parties became acquainted in 1879, and on the 16th of June, 1880, the respondent wrote to the petitioner a perfectly sensible letter accepting him as her future husband, and they visited each other at the residences of their friends, and there was no appearance then of any derangement of her intellect.

At Christmas, 1880, it was agreed that they should be married on the 17th of March, 1881, but the respondent wrote to postpone the marriage, and on the 12th of March he went to see her. He found her in a troubled and excited state, but she eventually agreed that the marriage should take place as arranged. On the morning of the marriage she received him very coldly, and was continually rubbing her hands, and at first refused to be dressed for church, and after the wedding to change her dress to go away. All day long, and on the journey to London, she was quite quiet, and when they arrived at their apartments she refused to have supper, and said that she did not want to get married, and that she was false. She lay down on the bed in her clothes, and for three hours refused to undress, and in the morning asked her husband to cut her throat. The marriage was not consummated. In the morning a medical man was called in, who pronounced her to be insane, and directed her to be watched to prevent her

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committing suicide. According to his evidence she was sitting in the corner of the room, a picture of misery, wringing her hands, and he was not able to get a word from her. On the 8th of April she was visited by Dr. Savage, the senior physician of Bethlehem Hospital, who gave the following report, which he subsequently confirmed as a witness at the trial, viz.: "In my opinion the patient is suffering from melancholia, owing in the first instance to hereditary insanity excited by the idea of marriage. I should think she was of unsound mind at the time of the marriage, as her actions point to a complete change in her character and disposition. She shewed an unreasonable aversion to the lover of her own choice; she thought herself unfaithful, which is not true, fit to go to prison, and unworthy to live. If she had committed suicide the verdict would assuredly be of unsound mind. The patient may probably recover, but be liable to a relapse; and if she have children may probably have recurrences of melancholia and transmit the insane tendency."

It also appeared that the day after the marriage she attempted to cut her throat.

As to the respondent having children, or the effects upon them, the Court held that it had nothing to do with the question, which was solely whether she was sane at the time of the marriage.

SIR J. HANNEN (President). I see no reason to entertain the slightest suspicion that there is any want of good faith in bringing this action. The husband and his friends appear to have behaved with kindness and consideration in the matter; and from the advice they received from the medical men who were called in, it was natural that they should arrive at the conclusion which they have endeavoured to establish by their evidence to the Court, namely, that this young woman was not of sound mind at the time of the marriage. Her position is in a certain sense consistent with either view. Whether it was the effect of insanity or not, it is certain she exhibited the greatest repugnance to entering upon the condition of a married woman, and that appears to be the state of her mind now. Of course it is just possible that she may have given the evidence which she has with a view of freeing herself from a tie which it is plain has become distasteful

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to her, but I must judge of the facts of the case by the other evidence.

The question which I have to determine is not whether she was aware that she was going through the ceremony of marriage, but whether she was capable of understanding the nature of the contract she was entering into, free from the influence of morbid delusions upon the subject.

The evidence which has been given by the medical men shews that at any rate very soon after the marriage she was speaking of herself as a wicked woman, who had committed crimes for which she was liable to be taken to prison, and that she, on that occasion thought herself an unfit person to be united in matrimony with so good a man as she spoke of Mr. Hunter as being. But from the evidence of her mother, which I do not in the least doubt, that her daughter has always been a well conducted and virtuous young woman, it is obvious that the respondent must have been labouring under a morbid delusion and imagining things that never existed;—that she had committed some crime, that she was so wicked that she was unfit to be married to an honest man. As evidence of the intensity of these delusions it is shewn, notwithstanding the feeble denials of the mother, that she had marks on her throat, which appeared to the medical men who examined her to be consistent with her having done that which it is alleged she had done, namely attempted to take her own life. She was spoken to on the subject, but she says she remembers nothing of the kind, and it may be, that at that particular time she was in a state of semi-unconsciousness—that she was not fully conscious of what was passing, and that she has now forgotten it; but, it appears, that in the presence of her mother she was asked how it was she attempted to commit suicide, and she then stated she was sorry she had not succeeded; and moreover, the respondent herself acknowledges that such was the state of her feelings on the morning after the marriage that she requested her husband to cut her throat. It is evident, therefore, that at that time she was in such a state of mind as to make it likely she would subsequently do that which it is alleged she did.

The medical evidence, therefore, establishes that at the time she was seen by these two gentlemen respectively she was of

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unsound mind; and having regard to the nature of the ailment, which has been described as one which is liable to recur from time to time when a sufficiently exciting cause arises, I come to the conclusion that the evidence which has been given of her manner preceding the marriage establishes that that excitement had been set up by the idea of her approaching marriage, and that she was not able to know and appreciate the act she was doing at that time, but that she took an entirely morbid and diseased view of it. I therefore think the case is established, and pronounce a decree nisi.

Solicitor for petitioner: *G. W. Barnard.*
Solicitors for respondent: *Ford & Ford.*

R. A. P.

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CANNON *v.* SMALLEY, otherwise CANNON.

THIS was a petition by a husband for nullity of marriage by reason of the insanity of the respondent at the time of the marriage. The respondent appeared by her father as guardian and denied the allegation.

The petitioner was the son of a licensed victualler, and the respondent the daughter of a professional musician, and they were married on the 1st of January, 1884. The respondent had performed her usual duties until the day before the marriage, amongst other things giving singing lessons, and nothing remarkable had been noticed except that she was at times dull and reticent. She was very quiet on the day of the wedding, and in the afternoon the petitioner and respondent left for Wigan, and on the way she said she was not worthy of him. On their arrival at Wigan the respondent introduced him to her sister, who was a barmaid in the refreshment room at the station there. Next day he, the respondent, and her sister went from Wigan into Staffordshire, to visit her brother and his wife, and returned to Wigan that evening. She was then reticent. Next day they returned to London. On the 4th and 5th of January he could not get her to take interest in anything. On the 6th he called in Dr. Jeffries

who saw her on that day and the 7th. That gentleman arrived at the conclusion that her mind was affected, and recommended that she should be sent to her mother's. She went there, and on the 11th was seen by Dr. Savage, the senior medical superintendent of Bethlehem, who stated that her mind was affected. It appeared also that she had tied a string round her throat and tried to strangle herself, and had set fire to a toilette mat. On the 27th of April she was taken to Bethlehem Hospital, where the petitioner visited her, and she was permitted to walk out with him sometimes, and on the 27th of August he was allowed to take her home. She seemed then much improved in mind, but on the 29th she became violent, and sat at a window in her night dress. She was then labouring under delusions, and on the 31st she was brought back to Bethlehem Hospital, of which she has been an inmate ever since.

Dr. G. H. Savage, senior medical superintendent of Bethlehem Hospital, stated that when called in on the 11th of January, 1884, he was told that the respondent had not taken much interest in getting things for her wedding, and that she had been dull before the marriage, but that her mother and family had thought that condition of things would pass off after the marriage. The patient had her head bent down and was picking her fingers, but he was not told that up to then she had had any delusions. He asked her many questions, and explained to her his reason for putting them. She took little or no interest in them, merely replying in a very low tone by words to the effect that she could not help it, or could not understand. He came to the conclusion that she was suffering from melancholia, but he thought that she might possibly recover. Saw her again on the 10th or 11th of March, and found that the melancholia had markedly progressed. In Bethlehem she had marked delusions—such as that the petitioner was not her husband, and that she was not married, but she improved so much for a time there that she was sent to the Convalescent Home. When he returned, in September, 1884, from his summer holiday he found that her condition had passed into one of violent mania. Recovery in her case was possible, but the prospects of it were not favourable. The percentage of recoveries was small in cases of twelve months' standing, and it

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became smaller in proportion to the longer continuance of the disease.

In reply to the Court, Dr. Savage said that not having seen the respondent on her wedding-day, he should not like to give a positive opinion as to her mental state at that date. He thought, from what he had heard and from the symptoms he saw, that there was melancholia in her mental condition at the time of the marriage, but it and mental capacity might co-exist. He was of opinion that to a certain extent the respondent understood what she was doing when she was contracting the marriage, but that to the full extent she did not understand the marriage relations. It would be very difficult to draw the line of demarcation and say when exactly mental capacity ceased and mental incapacity set in as a development of melancholia. Sometimes the transition, so as to be noticeable, was very rapid. A patient might appear to be mentally competent one day and might be plainly of unsound mind the day after.

Bayford, appeared for the petitioner.
Searle, for the respondent.

SIR J. HANNEN (President). The letter written by the respondent to the petitioner on the 28th of December, 1883, is of itself strong evidence that she was then of sound mind. She was then suffering in her physical health, and it might be in this case that physical had something to do with mental health, and that even at that date the balance of the respondent's mind was unsettled and likely to be upset; but the question to be decided is whether it is shewn to have been upset on the 1st of January, 1884, the date of the marriage. Dr. Savage has stated that the transition from a normal to an insane condition of mind might be very sudden; that a person might be one day of sound mind and the day following of unsound mind; and the same witness agreed that melancholia might be sometimes of such a character that the person afflicted by it would be capable of understanding what was going on. The onus of shewing that when the respondent entered into the contract she was incapable of understanding its nature and what she herself was doing lies on the party who

impeaches the validity of the marriage. There is no evidence to sustain the proposition that she was incapable; and therefore, while sympathising with the petitioner, against whom there is not anything to be said, I can not hold that he has established his case.

Petition dismissed with costs.

Solicitor for petitioner: *James White.*
Solicitor for respondent: *T. L. Yates.*

R. A. P.

THE EUROPEAN.

March 24.

Collision—Liability—Evidence of Negligence—Steam-steering Gear.

A steamship fitted with a patent steam-steering gear ran into a vessel at anchor in the Thames, owing to the steering gear suddenly not acting; every effort was unavailingly made to avoid the collision. A few days before, on the previous voyage of the same steamship, the same apparatus had similarly refused to act, but no cause for it so doing could be seen on examination. Large numbers of the gears were in use on steamers. In an action of damage:—

Held, first, that the defendants were not liable for damage caused by the use of this apparatus without negligence. Secondly, that the use of this apparatus on the Thames after it had acted wrongly on a previous occasion, was evidence of negligence, and that the defendants were liable for the damage caused thereby.

ACTION of damage by collision. The plaintiffs were the owners of the brig *Nio*, and sought to recover damages for an injury done to their vessel by the steamship *European*, of which the defendants were the owners. On the afternoon of the 24th of August, 1884, the *Nio* was lying properly moored at Huntley's Wharf, on the south side of Greenwich Reach, in the Thames, when the *European*, a large steamer bound from Millwall Dock to New York, ran into her and did her considerable damage.

The *European*, which was in charge of a duly licensed pilot, was being steered by a steam-steering apparatus, of which Messrs. Higginson & Co. were the patentees. All went well, and the *European* properly answered her helm until she arrived near the *Nio*, when suddenly some derangement of the steam-steering gear occurred, the helm went hard over to port, the helmsman being unable to control or move it; the ship's engines were at

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once stopped and reversed and the anchor was let go, but the *European* ran into the *Nio* before she could be stopped.

Evidence was given to shew that after the derangement of the steam-steering gear every possible effort was made by those on the *European* to avoid the collision. It was also proved that a similar derangement of the machinery had occurred on a previous occasion a few days before on the Thames on the inward voyage of the *European*, but that on a careful examination of the machinery by competent persons no cause for this derangement could be discovered. It was further proved that about 500 of Messrs. Higginson's apparatus were in use, and persons were called to testify to their utility; on the other hand, evidence was given by skilled engineers, among others, one of the engineers to the Board of Trade, to the effect that there was a radical defect in the plan of the construction of this patent, and that there was a probability of the machinery getting out of order.

March 16. *Finlay, Q.C.*, and *Bucknill*, for the plaintiffs. First, the defendants are liable even if negligence is not proved, they are bound to manage their property so that it does not injure that of other persons: *Tarry* v. *Ashton*. (1) The steam-steering gear is, in the eye of the law, a dangerous machine, and therefore if it causes injury, the defendants are liable: *Powell* v. *Fall*. (2) Next, there was negligence on the part of the defendants; the machinery had gone wrong a few days before, and the vessel was started again on her voyage with the machinery unaltered.

Sir W. Phillimore, and *Barnes*, for the defendants. If there was negligence it was that of the patentees of the machinery, and the defendants are not under such circumstances liable personally, there being no negligence by themselves or their servants: *The Virgo* (3); *The Warkworth* (4); *The William Lindsay*. (5) The gear had been looked over by a skilled person, and no fault being found in it, there was no negligence in again using it.

The cases relied on by the other side in regard to the liability of the defendants for the mere use of the machinery are not

(1) 1 Q. B. D. 314.
(2) 5 Q. B. D. 597.
(3) 35 L. T. 519.
(4) 9 P. D. 145.
(5) Law Rep. 5 P. C. 338.

applicable to this case: *Quarman* v. *Burnett* (1); *Hughes* v. *Percival.* (2)

Bucknill, in reply.

Cur. adv. vult.

March 24. BUTT, J. The plaintiffs, the owners of the brig *Nio*, seek to recover damages for an injury done to their vessel by the steamship *European*, owned by the defendants. In the afternoon of the 24th of August, 1884, the *Nio* was lying properly moored at Huntley's Wharf, on the south side of Greenwich Reach, in the River Thames, when the *European*, a large steamer bound from Millwall Dock to New York, ran into her, doing considerable damage.

The *European*, which was in charge of a duly licensed pilot, was being steered by a steam-steering apparatus, of which Messrs. Higginson, of Liverpool, are the patentees. All went well, and the vessel properly answered her helm until she arrived at the place in question, when suddenly some derangement of the steam-steering gear occurred, the ship's helm went hard over to port, the helmsman being unable to control or move it. The ship's engines were at once stopped and reversed, and her anchor was let go, but she ran into the *Nio* before her way could be stopped.

The evidence clearly established that all that could be done to avoid the collision was done after the machinery went wrong.

The plaintiffs contended that the defendants are liable, even assuming that neither they nor their servants were guilty of negligence. In support of this proposition the plaintiffs rely on a class of cases of which *Tarry* v. *Ashton* (3) is an example. I think, however, they are not entitled to succeed on this contention. Those are cases where the defendants were persons in possession of real property, and with reference to them the rule of law seems to be that they must take care that their property is so used or managed that other persons are not injured, and that, whether their property be managed by themselves or their servants. The same rule does not apply to the use or management of moveable chattels. This distinction is clearly pointed

(1) 6 M. & W. 499. (2) 8 App. Cas. 443.
(3) 1 Q. B. D. 314.

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out by Parke, B., in delivering the judgment of the Court of Exchequer in the case of *Quarman* v. *Burnett.* (1)

The case of *Powell* v. *Fall* (2) was also relied on by the plaintiffs' counsel in support of the contention stated above. That was the case of damage to a hayrick by fire from a locomotive steam-engine which was being driven along the high road. There is, in my opinion, no analogy between that case and the present. Moreover, in that case it seems to have been admitted throughout, that the defendants, the owners of the engine in question, were liable for the injury complained of, although occasioned by no negligence of themselves or their servants, unless the Locomotive Acts protected them. I have, therefore, no hesitation in holding that the defendants in the present case are not liable unless the damage was caused by the negligence of themselves or their servants.

Was it occasioned by such negligence? I have already found that there was no negligence after the derangement of the machinery occurred, but it was proved that on the way up the Thames on the inward voyage of the *European* immediately preceding the voyage in question a precisely similar difficulty had arisen below Gravesend, and that in consequence the use of the steam-steering gear had been discontinued, and the vessel had been steered by hand up to the docks. Shortly afterwards the machinery had been taken to pieces and readjusted by a competent fitter, who however failed to discover the cause of the derangement, and there was therefore no assurance that the vice, whatever it may have been, had been cured by the overhauling of the machinery. I do not forget that there is evidence in the case that some 500 of Messrs. Higginson's "steam quartermasters," as they are called, have been supplied to different ships, and that they have generally worked well, and without developing the defect now under consideration. What that defect may be is a question on which, on the evidence, neither the Elder Brethren of the Trinity House nor myself have arrived at a definite conclusion; although the evidence of Mr. Gray and Mr. Flannery would seem to point to a radical error of construction. I cannot, however, help thinking, having regard to what

(1) 6 M. & W. 510. (2) 5 Q. B. D. 597.

had happened to the machinery only a few days before, that to trust the control of a ship of 1736 tons net register to the self-same apparatus in the crowded and intricate navigation of the Thames, was an act imprudent in itself and likely to cause damage to the property of other people. It was the less justifiable because there would appear to have been no objection to the use of the hand-steering gear alone. I feel constrained to hold that this constituted negligence on the part of the defendants, and to pronounce for the damage proceeded for.

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Solicitors for plaintiffs: *T. Cooper & Co.*
Solicitors for defendants: *Pritchard & Sons.*

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THE GLENFRUIN.

March 31.

Salvage—Salving and salved Ships belonging to same Owners—Warranty of Seaworthiness—Bill of Lading—Exceptions—"Dangers and accidents of the seas."

A steamship laden with cargo became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils "all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind." Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, masters, and crew of the salving vessel against the owners of cargo on the salved ship:—

Held, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage:

Held, also, that the exceptions in the bill of lading had no application to a vessel not seaworthy at the time of sailing, and that the defendants were entitled to judgment on their counter-claim for the salvage awarded to the master and crew.

ACTION for salvage. The plaintiffs were the owners, master and crew of the steamship *Glenavon*, of 2985 tons gross register, manned by a crew of sixty-six hands.

The defendants were the owners of cargo laden on board the steamship *Glenfruin*, a vessel of about the same size as the *Glenavon*, and belonging to the same owners. At the time of the salvage services proceeded for in this action the *Glenfruin* was bound from Hankow to London with tea. The *Glenfruin* and her

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freight were of the value of 70,000*l.*, and her cargo of the value of 158,000*l.*—228,000*l.* in all.

On the 18th of June, 1884, the main shaft of the *Glenfruin* broke in the Indian Ocean, the machinery was thereby, for the time, rendered useless, and she was practically unmanageable under sail.

On the 26th of June the *Glenavon*, also laden with tea, and bound on a voyage from Japan and China to New York, fell in with the *Glenfruin*. There were twenty owners of shares in each ship, nineteen of whom held amongst them $\frac{62}{64}$ shares of each vessel, the remaining $\frac{2}{64}$ shares in each ship were held by a person who was not a part owner in the other. It was agreed that, for the purposes of this action, the values of the *Glenavon*, her freight and cargo, should be taken to be equal to those of the *Glenfruin*, her freight and cargo.

At the request of the master of the *Glenfruin* the *Glenavon* took hold of her and towed her on her voyage, a distance of about 900 miles. By the 2nd of July the shaft of the *Glenfruin* had been repaired so that she could use her engines, though not at full speed. As it was uncertain whether the repairs to the shaft would hold good, the *Glenavon* kept in company of the *Glenfruin* until the 5th of July, when, the *Glenfruin's* engines continuing to work well, the *Glenavon* left her and proceeded for New York. The weather was fine during the salvage services. The *Glenfruin* reached her port of destination in safety.

The bills of lading of the *Glenfruin* contained the following amongst other exceptions:—

"The act of God, the Queen's enemies, pirates, robbers by land or sea; restraint of princes, rulers or people; loss or damage from machinery, boilers, or steam, or from explosion, heat, or fire on board, in hulk or craft, or on shore; jettison, barratry; misfeasance, error in judgment; any act, neglect, or default whatsoever of pilots, master, or crew in the management or navigation of the ship; risks of craft, or hulk, or transshipment, and all and every the dangers and accidents of the seas, rivers, and canal, and of navigation of whatsoever nature or kind are excepted."

The plaintiffs in the statement of claim set out the facts of the service and claimed salvage.

The defendants by the 4th paragraph of the statement of defence alleged that the plaintiffs, being also the owners of the *Glenfruin*, contracted to carry the cargo in that vessel to London, and that the towage of the *Glenfruin* by the *Glenavon* was done only in fulfilment of such contract, and for the purpose of enabling their vessel the *Glenfruin* to earn the stipulated freight, or for the purpose of avoiding their liability for the non-delivery of the cargo.

By the 5th paragraph they alleged that the cargo of the *Glenfruin* was laden on board on the terms that the *Glenfruin* should be seaworthy for her voyage, and reasonably fit to carry the cargo to its destination when she sailed. They denied that she was, and alleged that the screw shaft of the *Glenfruin* was defective, unsound, and in improper condition, and improperly fitted, and consequently caused the accident, which rendered the assistance of the *Glenavon* necessary, and so barred the plaintiffs' claim.

By way of counter-claim the defendants alleged that they had suffered damage by breaches of contract of bills of lading, and that the plaintiffs only delivered the goods subject to certain claims for salvage which they had left the defendants liable to pay. They further alleged that the *Glenfruin* was not seaworthy for the voyage, and not reasonably fit to carry the goods to their destination, and they therefore claimed any sum, which they might be adjudged liable to pay as salvage, from the plaintiffs.

By their reply the plaintiffs said, that if they contracted as alleged, the act of towing the *Glenfruin* was not done in fulfilment of such contract. They denied the alleged unseaworthiness of the *Glenfruin*, or that the shaft in question was unsound, and alternatively they relied on the exceptions in the bill of lading already set out.

March 9, 10. Evidence was given, which proved that the shaft of the *Glenfruin* broke, in consequence of a latent flaw, and which also explained the character and the manner of welding crank shafts, and shewed that it was impossible to discover a latent flaw in a shaft such as was the cause of the accident in this case.

March 18. The questions of law were argued.

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Russell, *Q.C.*, and *Cohen*, *Q.C.* (*Bucknill* with them), for the plaintiffs. The plaintiffs, who are owners of both ships as well as the master and crew of the *Glenavon*, are entitled to salvage from the owners of cargo on the *Glenfruin*. This depends, first, on what is the warranty which under the circumstances of this case the law implies from the relationship of cargo-owner and shipowner. Secondly, has that warranty been broken by the plaintiffs so as to prevent them from recovering in this action? The law implies a warranty of seaworthiness, but it is not an absolute warranty of perfection, but only that the ship shall be as seaworthy as she reasonably can be or can be made by known methods. This warranty cannot be put higher than that between assurer and assured: *Burgess* v. *Wickham*. (1) It is clear that the accident did not arise from any want of care on the part of the shipowners, and therefore the implied warranty has been fulfilled. As to the exceptions in the bill of lading, these exempt the shipowner from any common law liability. They apply to a mischief which happens to a ship or its machinery in the course of a voyage, and which is not attributable to any want of care at the beginning of the voyage. As to the meaning of the words "accidents of navigation," they have been explained in *Nugent* v. *Smith* (2); on this point *The Miranda* (3) also applies. There being no previous default by the shipowner the exceptions are applicable: *Phillips* v. *Clark* (4); *Grill* v. *General Iron Screw Collier Co.* (5)

Webster, *Q.C.*, and *Tyser* (*Barnes*, with them), for the defendants. The exceptions cannot excuse the shipowner from a breach of his warranty, which is an absolute warranty of seaworthiness, any more than they can from the consequences of the negligence of his crew. There has been such a breach of warranty here, for the *Glenfruin* was not in fact seaworthy when she set out on her voyage: *Steel* v. *State Line Steamship Co.* (6); *Kopitoff* v. *Wilson* (7); and so the exceptions if applicable by their wording do not apply. But the words are not applicable to these circum-

(1) 3 B. & S. 669.
(2) 1 C. P. D. 439.
(3) 3 Ad. & Ecc. 561.
(4) 2 H. & C. 284.
(5) Law Rep. 1 C. P. 600.
(6) 3 App. Cas. 72
(7) 1 Q. B. D. 377.

stances, "accidents of navigation" do not include the breaking of a shaft. *The Miranda* (1) does not govern the present case, having regard to *Steel* v. *State Line Steamship Co.* (2) On both grounds, therefore, the defendants are entitled to succeed. [They also referred to *Tattersall* v. *National Steamship Co.* (3), and *Cohn* v. *Davidson.* (4)]

Cohen, Q.C., in reply.

Cur. adv. vult.

March 31. BUTT, J. (after stating the facts as already set out, proceeded):—

The principal questions raised and discussed in the case were:—

(1.) Was the breakdown of the *Glenfruin's* shaft caused by unseaworthiness?

(2.) Does the implied warranty of seaworthiness in the bill of lading amount to a contract by the shipowner that the ship (including her machinery) shall be in fact reasonably fit for the voyage, or only that due care shall be taken to make her so fit?

(3.) Was the warranty qualified, or were the shipowners otherwise exempted from liability for the breaking of the shaft by the exceptions in the bill of lading?

With reference to the first of these questions, it appears from the evidence that very few, if any, of these large shafts are turned out, even by the best makers, without some flaw in the welding. If one of such flaws is of a serious nature it is apt to extend from the strain put upon it by the working of the engines, and, in the course of time, so to weaken the shaft as to make it unfit for the purposes for which it is designed. This is almost always, if not always, the cause of the breaking of the shafts of large steamers. The shaft in question had been made by one of the best firms, and after its completion it was impossible for that firm or for the owners of the ship to discover the flaw until it was laid bare by the breaking of the shaft.

That flaw was a very serious one. It had no doubt increased gradually during the four years the shaft was in use, and the

(1) 3 Ad. & Ecc. 561.
(2) 3 App. Cas. 72.
(3) 12 Q. B. D. 297.
(4) 2 Q. B. D. 455.

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defect culminated in the breakdown on a voyage on which the ship had met with no more than ordinary weather. I find as a fact that when the *Glenfruin* started from Hankow the shaft was not reasonably fit for the voyage, in other words that the ship was unseaworthy.

On the second question, viz., that relating to the nature and extent of the warranty of seaworthiness, I am, I think, concluded by authority. I have always understood the result of the cases, from *Lyon* v. *Mells* (1) to *Kopitoff* v. *Wilson* (2), to be that under his implied warranty of seaworthiness the shipowner contracts, not merely that he will do his best to make the ship reasonably fit, but that she shall really be reasonably fit for the voyage. Had those cases left any doubt in my mind it would have been set at rest by the observations of some of the peers in the opinions they delivered in the case of *Steel* v. *State Line Steamship Co.* (3)

Thirdly, I am of opinion that the exceptions in the bill of lading have not the effect either of limiting the implied warranty or of otherwise exempting the shipowner from liability to the owners of cargo for damage or loss occasioned by the breaking of the shaft. It appears to me that the reasonable construction of the exceptions relied on by the plaintiffs, viz., "all and every the dangers and accidents of the seas, rivers, and canal and of navigation of whatever nature or kind" must be "dangers and accidents" happening to a seaworthy vessel, and that the exception has no application to the case of a ship which was unseaworthy at the time of sailing, and the unseaworthiness of which was the efficient cause of the loss or damage. In the case of *Steel* v. *State Line Steamship Co.* (3), to which I have already referred, the decision of the House of Lords was that the exceptions contained in the bill of lading then under consideration were exceptions of matters subsequent to the sailing of the ship with the goods on board. I can see no reason for taking a different view of the exceptions in the bill of lading in the present case. The result is that the part owners of the *Glenavon*, who were also part owners of the *Glenfruin*, would be liable to the owners of cargo

(1) 5 East, 428. (2) 1 Q. B. D. 377.
(3) 3 App. Cas. 72.

on board the *Glenfruin* for any loss occasioned by the breakdown of the machinery. In other words, such part owners (plaintiffs in the present suit) would be liable to reimburse the defendants any amount of salvage which I might award. To avoid what is termed "circuity of action" I must decline to make any award to those plaintiffs.

There is, however, one of the plaintiffs (the owner of two sixty-fourth shares of the *Glenavon*) who is not a part owner of the *Glenfruin*, and who would therefore be entitled to his proportion of the salvage which would have been awarded to the plaintiffs, had none of them been part owners of the *Glenfruin*. Again, I do not understand it to have been contended, either in the pleadings or in the argument, that the master and crew of the *Glenavon* are not entitled to salvage remuneration. Having regard to all the circumstances of the case, and bearing in mind that the two ships, for practical purposes, must be taken to have belonged to the same owners, and that the cargo only of the *Glenfruin*, and not ship, freight, and cargo, are proceeded against in this action, I award 40*l.* to the plaintiff William Houston, 50*l.* to the master, and 250*l.* to the officers and crew of the *Glenavon* according to their respective ratings. There will also be judgment for the defendants on their counter-claim against the owners of the *Glenfruin* for the amount of salvage awarded.

Solicitors for plaintiffs: *Hollams, Son, & Coward.*
Solicitors for defendants: *Waltons, Bubb, & Johnson.*

E. S. R.

1885
April 14.

[IN THE COURT OF APPEAL.]

AHIER *v.* AHIER.

Practice—Divorce Court—Application for New Trial—Time for appealing— 23 *&* 24 *Vict. c.* 144, *s.* 2; 36 *&* 37 *Vict. c.* 66, *s.* 16; 38 *&* 39 *Vict. c.* 77, *s.* 18; 44 *&* 45 *Vict. c.* 68, *s.* 9.

An appeal from a decision of a judge of the Probate Division granting or refusing a new trial in the Divorce Court must be made within fourteen days in accordance with the Divorce Court Act, 1860 (23 & 24 Vict. c. 144), s. 2.

In this case Eleanor E. Ahier presented a petition against her husband, Philippe Ahier, for dissolution of the marriage on the ground of cruelty and adultery.

The action was tried on the 13th of February, 1885, by Butt, J., without a jury, and the respondent not appearing, a decree nisi was made for dissolution of the marriage. The respondent, on the 3rd of March, applied to Butt, J., for a new trial, but his Lordship refused the application.

The respondent gave notice of appeal from this decision within twenty-one days from the date of the refusal of the application but after fourteen days had expired.

C. H. Turner, for the appellant.

Inderwick, Q.C., and *Bayford*, for Mrs. Ahier, took the preliminary objection that the appeal was brought too late. An appeal from the granting or refusal of a new trial in the Divorce Court must be brought within fourteen days. At the time when the Judicature Acts were passed the only right of appeal from the granting or refusal of an application for a new trial in the Divorce Court was under 23 & 24 Vict. c. 144, s. 2, which enacted that "in addition to the cases in which an appeal to the full Court now lies from the decisions of the Judge Ordinary, either party dissatisfied with the decision of such judge sitting alone granting or refusing an application for a new trial which by virtue of the Act he is empowered to hear and determine, may within fourteen days after the pronouncing thereof appeal to the full Court, whose decision shall be final." Then by the Judicature

Act, 1873, s. 16, the jurisdiction of the Divorce Court was transferred to the High Court of Justice; but by the Judicature Act, 1875, s. 18, and Order LXII. (1875), all existing rules and orders of the Divorce Court were to remain in force except where expressly altered. The practice therefore remained the same till the Judicature Act, 1881, was passed, which by s. 9 enacted that all appeals which under s. 55 of 20 & 21 Vict. c. 85, or under any other Act might be brought to the full Court established by the first mentioned Act, should thenceforth be brought to the Court of Appeal, and not to the said full Court. But there was nothing in the substitution of the Court of Appeal for the full Court which altered the time within which appeals in the Divorce Court could be brought. Therefore the period of fourteen days remained.

C. H. Turner, for the appellant. The effect of the Judicature Act, 1881, s. 9, which substituted this Court of Appeal for the full Divorce Court was to make appeals from the Divorce Court subject to the same rules as those from other divisions of the Supreme Court. What the origin of the right of appeal may have been is of no importance; the Divorce Court is a branch of the Supreme Court, and now that appeals from it lie to the Court of Appeal it would be very inconvenient if they were to be governed by different rules. The ordinary period of twenty-one days laid down by Order LVIII., rule 15, therefore applies to this appeal.

COTTON, L.J. I am of opinion that the objection must prevail. It is not contended that independently of the Act of 1860 (23 & 24 Vict. c. 144) there was any appeal in the Divorce Court from the granting or refusal of a new trial before the Judicature Act, 1881. Then, by the 9th section of the last-mentioned Act, it was enacted that "all appeals which under s. 55 of 20 & 21 Vict. c. 85, or under any other Act might be brought to the full Court established by the said first mentioned Act shall henceforth be brought to her Majesty's Court of Appeal and not to the said full Court," and further, that "this section so far as is consistent with the tenor thereof shall be construed as one with the said Acts." What is done by that section is to substitute

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the Court of Appeal for the full Divorce Court for deciding all appeals which could have been brought to the full Divorce Court; and by 23 & 24 Vict. c. 144, s. 2, it was enacted that either party dissatisfied with the decision of the Judge Ordinary sitting alone in granting or refusing an application for a new trial may within fourteen days after the pronouncing thereof appeal to the full Court, whose decision shall be final. We must read that section as if the Court of Appeal was substituted in it for the full Court of Divorce. The right of appeal to the full Divorce Court is only given if brought within fourteen days, therefore this is not an appeal which could have been brought under the Act of 1860.

We have no power to enlarge the time. The only right of appeal given by the statute is to those who appeal within fourteen days, and no discretion is given to this Court to dispense with that limit.

BOWEN and FRY, L.JJ., concurred.

Solicitors: *Turner, Son, & Norton; Helder & Roberts*, for *Brockbank, Helder, & Brockbank, Whitehaven.*

M. W.

May 12.

[IN THE COURT OF APPEAL.]

THE FRIEDEBERG.

Practice—Costs—Reference.

As by Order LXV., r. 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings are in the discretion of the Court, the general rule of practice in the Admiralty Court as to the costs of references, namely, that when more than a fourth is struck off a claim, each party pays his own costs, and when more than a third the claimant pays the other party's costs, is wrong, and the Court must exercise its discretion according to the circumstances of each particular case.

The Empress Eugénie (Lush. 140) overruled.

APPEAL by the defendants, the owners of the *Friedeberg*, from a decision of Butt, J., whereby he condemned them in the costs of a collision action, in which the *Friedeberg* had been held alone to blame, and ordered each side to pay their costs of the subse-

quent reference. In such reference the defendants had struck off more than one-third of the plaintiffs' claim. The defendants appealed against the decision on the ground that by the well established practice of the Court, approved by judicial decisions, if one-third is struck off a claim at a reference, the claimant must pay the costs of the reference, unless there is any special reason to the contrary.

Hall, Q.C. (*Bucknill*, with him), for the appellants.

[*Beaufort* (*Sir W. Phillimore*, with him), for the respondents, took the preliminary objection that no appeal would lie from the decision of Butt, J., since it was one as to costs only.]

Hall, Q.C. This appeal involves a question of principle, and so can be heard. It is admitted that the judge has a discretion over the costs, but he has exercised it wrongly, because he has departed from a rule as to the costs of references well established by long practice and approved by numerous judicial decisions; the leading case is that of *The Empress Eugénie* (1), and the decision in that case has always been followed. One-third of the plaintiffs' claim was struck off in the present case, and there is no reason why, according to the practice, the plaintiffs should not pay the costs of the reference.

Sir W. Phillimore, and *Beaufort*, were not called on.

BRETT, M.R. The Court of Admiralty always had a discretion in regard to costs; even if it had not, it would have been given by the Judicature Acts; but, in fact, Order LXV., r. 1, has affirmed the already existing discretion. When a Court has such a discretion it is intended that it should exercise it in each individual case. The moment, therefore, that a hard and fast rule is laid down as to costs, the judge's discretion is fettered. With all deference to that eminent judge, Dr. Lushington, the moment he laid down as a general rule, that if, on a reference, the plaintiff did not obtain a certain proportion of his claim, he was to be deprived of, or to pay, costs, he did what was wrong. For he tried to fetter his own discretion and that of his successors, which he had no legal power to do. As to the rule, if it could be made,

(1) Lush. 138.

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I doubt if it would be a good rule, and in many cases it must work injustice. But since the judge of the Admiralty Court must exercise his discretion in every case, it is wrong to say that there is any rule by which he can be bound. In the present case such discretion has been exercised, and the reasons for it have been given, and the judge came to the conclusion that the plaintiff was entitled to the costs of the action, and ought not to pay the costs of the defendant on the reference, and there is no ground for our interfering with his judgment. We have given our opinion on the rule; we think, however, that the preliminary objection was a valid one, and that there was no appeal from this decision. On all these grounds the appeal must be dismissed with costs.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Gregory & Co.*
Solicitor for respondents: *T. Southgate.*

E. S. R.

April 17.

THE RAISBY.

Salvage—Cargo—Liability of Shipowner—Agreement—Average Bond.

The *G.* fell in with the *R.* which was in distress. The following agreement was signed by the two captains: "At my request the captain of the *G.* will tow my ship the *R.* to St. Nazaire, that being the nearest port, for repairs. The matter of compensation to be left to arbitrators at home." The *G.* towed the *R.* safely to St. Nazaire. The *R.* discharged her cargo at Dunkirk, and an average bond in the usual form was taken from the consignees of the cargo. The owners of the *G.* brought an action for salvage of the ship and freight against the *R.*, and were awarded salvage. They also brought an action in France for the salvage of the cargo against the cargo owners, but failed in it. They then brought this action in personam against the owners of the *R.* to recover salvage in respect of the services to the cargo or, in the alternative, damages from the defendants, for not taking a proper bond to secure salvage from the cargo owners:—

Held, that the defendants were not primarily liable to pay salvage in respect of the cargo, that they had not bound themselves by the above agreement to do so, and that it was not their duty to obtain a bond from the cargo owners for the proportion of any salvage which might be due.

ACTION in personam brought by the owners of the *Gironde* against the owners of the *Raisby* to recover from them salvage in

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respect of services rendered to the cargo on board the *Raisby* or, in the alternative, damages, on the ground that it was the duty of the defendants to the plaintiffs before delivering the cargo on the *Raisby* to the consignees, to obtain from them a bond to secure payment by them of any sum due in respect of general average and salvage upon the cargo.

The defendants' steamship *Raisby*, on her voyage from Bombay to Dunkirk, when about twelve miles from the Chaussée de Sein light, being disabled, made signals of distress. The plaintiffs' steamer *Gironde* went to her assistance, and the following document was signed by the captains: "At my request, the captain of the steamship *Gironde*, of Cardiff, will tow my ship, the steamship *Raisby*, of London, to St. Nazaire, that being the nearest port, for repairs. The matter of compensation to be left to arbitrators at home, to be appointed by the respective owners." The *Gironde* thereupon towed the *Raisby* to St. Nazaire, where she was sufficiently repaired to proceed to Dunkirk, her port of destination. The cargo was delivered to the several French consignees at Dunkirk. After some ineffectual attempts to arrange a reference, the plaintiffs commenced an action in this Division for salvage against the ship, freight, and cargo, but being unable to procure the appearance of the owners of the cargo in those proceedings, they were abandoned so far as they related to the cargo and its owners. The action was continued against the ship and freight and its owners alone. In that action a sum of 4000*l.* was recovered by the plaintiffs for the salvage of the ship and freight on an estimated value of 35,000*l.*

Whilst this action was proceeding, the plaintiffs commenced an action in the French Tribunal de Commerce at Dunkirk for salvage of the cargo, in which they failed, and they then proceeded in the present action against the owners of the *Raisby* personally, to recover from them remuneration for the salvage of the cargo, or damages for not obtaining a proper average bond. As to this it appeared from the evidence that the shipowners obtained from the consignees of the cargo a bond to pay whatever might be found to be due for general average.

April 17. The action was tried.

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THE RAISBY.

Sir W. Phillimore, and *Aspinall*, for the plaintiffs. The defendants are liable to pay salvage. They have by the agreement, to which the master of the *Raisby* was a party, and which he had authority to make on behalf of the shipowners, bound themselves to pay salvage, and salvage has not yet been paid in respect of the services to the cargo; there is no plea of res judicata raised by the defendants. But if the defendants are not bound by this agreement, they are impliedly liable in the first instance to pay salvage in respect of such freight and cargo, and to recover a proportion of it back from the cargo owners. There is no direct authority to this effect, but it follows from the decision of the House of Lords in *Anderson, Tritton & Co.* v. *Ocean Steamship Co.* (1) A further point is that the defendants should have taken a bond from the consignees of the cargo in France for the salvage due from them, and not having done so must pay it themselves by way of damages for their breach of duty.

Webster, Q.C., and *Myburgh, Q.C.* (*Bucknill*, with them), for the defendants. The master has no authority to bind the owners of the ship to pay a sum which may be awarded in respect of salvage services to the cargo. Even if he had, in this case he never made such an agreement. There is no authority for the assertion that the owners of the ship are liable for salvage to cargo; salvage is a reward for services rendered to property against which there is a possessory and a maritime lien. *Anderson, Tritton & Co.* v. *Ocean Steamship Co.* (1) is not an authority for the plaintiffs' proposition. The average bond is taken to secure payments to which the shipowners are legally liable, and is a matter between cargo owners and shipowners only: *Crooks* v. *Allan* (2); but in any case defendants took a bond in the usual form at the port of discharge, which is all that they are legally bound to do: *Simonds* v. *White*. (3)

Sir W. Phillimore, in reply.

Cur. adv. vult.

May 19. SIR JAMES HANNEN (after stating the facts as already set out). It seems to me clear that no primary liability rests on the ship or its owners to pay for the salvage of the cargo. It is

(1) 10 App. Cas. 107. (2) 5 Q. B. D. 38.
(3) 2 B. & C. 805.

laid down in Abbott on Shipping, tit. Salvage: "With respect to the parties liable to pay salvage, and the interest in respect of which it is payable, the rule is that the property actually benefited is alone chargeable with the salvage recovered." In *The Pyrennee* (1) it was expressly decided that the ship is not liable for the salvage of cargo, and the decision in the case of *The Mary Pleasants* (2) is to the same effect. But it was contended for the plaintiffs that in this case the defendants are liable by virtue of the alleged agreement entered into between the two captains. The so-called agreement, however, does not purport to extend the liability of the shipowners, or, indeed, to fix any liability on any one, except in so far as such liability may be created by the acknowledgment which it contains that the captain of the *Raisby* had requested the captain of the *Gironde* to tow his ship to St. Nazaire. This part of the document in no way alters the position of the matter from what it would have been if the captain of the *Raisby* had simply accepted the services of the *Gironde*, in which case it has not been contended that a claim could have been maintained against the ship or its owners for salvage of the cargo. The only agreement contained in the document is that "the matter of compensation" (without reference to the persons or property to bear it) is to be left to arbitrators at home. This, however, was valueless as an agreement. It could not have been pleaded as any answer to an action for salvage brought in the ordinary way in the Admiralty Division, and if effect could have been given to it at all, it would only have been by bringing an action upon it for not submitting to arbitration. This action, however, is not of that nature. It appears to me, therefore, that the plaintiffs altogether fail to shew any liability on the part of the defendants to pay for the salvage of the cargo. I should not have thought it necessary to say more than that, but that it has been argued that there are cases which though they do not expressly decide that the shipowner is liable in the first instance for the salvage of the cargo, yet imply such a liability. The most important of these cases is the recent one in the House of Lords of *Anderson, Tritton & Co.* v. *Ocean Steamship Co.* (3) There Lord

(1) Br. & L. 189.

(2) Swa. 224.

(3) 10 App. Cas. 107.

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Blackburn, delivering the judgment of the House, held that where the owners of a salved vessel had entered into a binding agreement with the salvors to pay, and had paid a particular sum for salvage of ship and cargo, they might recover such portion of it as a jury might think reasonable from the owners of cargo as general average. Their Lordships did not decide that, apart from agreement, the owners of the ship would have been liable to pay for the salvage of the cargo. The principle upon which the decision proceeded is explained in the passage cited at p. 114 from *Kemp* v. *Halliday*. (1) That principle is that money actually and necessarily expended for the preservation of ship and cargo is as much a voluntary sacrifice for the common benefit as the sacrifice of a mast or an anchor would be. Here the defendants have not paid anything in respect of the salvage of the cargo, nor have they entered into any agreement to pay it. As I have pointed out, the liability both as to the parties responsible and as to the amount is left at large, to be determined in due course of law, and that is, as it appears to me, that the plaintiffs must seek their remedy for salvage of cargo, as distinct from ship, from those who have had the benefit of that salvage.

Another ground of complaint is thus alleged in the statement of claim, "that it was the duty of the defendants to the plaintiffs, before delivering the cargo, to obtain from the consignees of the cargo a bond or agreement securing the payment by the consignees of any sum due from them and paid or recovered in respect of plaintiffs' services, and that the defendants have failed to perform this duty, and thereby have prevented the plaintiffs from recovering against the cargo the salvage due in respect of it."

But there was no duty towards the plaintiffs to obtain such a bond. If, indeed, the defendants were liable in this action, and could have obtained such a bond as the plaintiffs allege it was the defendants' duty to take, it was imprudent of them in their own interest not to do so; but the plaintiffs have no right of action against the defendants because they did not do so for their own security. But as a matter of fact the defendants did take an average agreement in the French form, which stipulates that the

(1) 6 B. & S. 723.

adjustment shall be "in conformity with law and with the jurisprudence of the Tribunal of Commerce at Dunkirk." It has not been shewn that they could have obtained any other. The allegation in the statement of claim that the plaintiffs have been prevented by the defendants from recovering against the cargo the salvage due in respect of it is wholly insufficient. It has been proved by M. Dumont, a French advocate, that the plaintiffs might have asserted their lien on the cargo by arresting it either at St. Nazaire or at Dunkirk, and the plaintiffs were expressly warned by the defendants' agent that if they did not arrest the cargo they would lose their lien, and that the responsibility must rest with them. Instead of doing this, the plaintiffs instituted a suit for salvage in the Tribunal of Commerce at Dunkirk against the owners of the cargo, in which they failed. I abstain, of course, from criticising this judgment, but M. Dumont was of opinion that it would have been reversed on appeal. I observe, however, that one of the grounds of the decision was "that the cargo had been delivered to the claimants thereof without the captain of the *Gironde* having taken any steps to make valid or protect the rights which he now claims to have over the cargo," from which it would seem that if the plaintiffs have lost their remedy against the cargo owners in France, it is by their own default.

For these reasons I am of opinion that the plaintiffs have failed to establish their claim, and that the action must be dismissed with costs.

Solicitors for plaintiffs: *Fielder & Sumner.*

Solicitors for defendants: *Botterell & Roche.*

E. S. R.

1885
May 1

THE SERAGLIO.

Warrant—Notice—Telegram.

When the marshal sends by telegram to his substitute at an outport notice of the issue of a warrant, and such substitute communicates it to the master of the ship against which it is issued, it is a contempt of Court to move the ship from the place where it is lying.

Motion for the release of the steamship *Seraglio*.

The action was for salvage, for services rendered by the steamship *Gazelle* to the *Seraglio*. After the action had been commenced, and whilst the *Seraglio* was lying at Plymouth, the plaintiffs obtained the usual warrant to arrest the vessel. Notice of the issue of the warrant was sent by telegraph by the marshal to the custom-house officer at Plymouth, who went on board the *Seraglio* to inform those in charge of her. The master of the *Seraglio*, however, by the owner's orders, left Plymouth with the custom-house officer on board, but on putting into Cardiff the warrant of arrest was there duly served on her.

The defendant by the present motion desired to have his ship released without filing an affidavit of value, on the ground that he resided in Glasgow. He further stated on affidavit that by the removal of the *Seraglio* from Plymouth after the receipt of the notice of the issue of the warrant, he had no intention to commit a contempt of Court, for in his opinion such notice was not equivalent to service of the warrant. If in the opinion of the Court it was equivalent to a formal service, then he tendered an apology to the Court for his action.

Bucknill, for the motion. By Order IX., r. 12, there are distinct instructions given as to the manner of service of the warrant, and therefore no mere notice of its issue is sufficient to place a ship within the jurisdiction of the Court or under the authority of the marshal. Accordingly the owner of the *Seraglio* was justified in removing his ship from Plymouth when he did.

Aspinall, for the plaintiffs. The defendant committed a contempt of Court. The information received by him from the custom-house officer was notice to him from the Court not to

remove his ship. It is the practice of the Chancery Division to send notice of an order for an injunction by telegraph: *Ex parte Langley.* (1) It would be a contempt of Court to disobey this notice of such an order, and it is equally so to disobey a notice of the issue of a warrant.

SIR JAMES HANNEN. The owner of the *Seraglio* is asking a favour of the Court, which gives me an opportunity of marking my sense of his conduct by refusing it.

I have only to deal with this matter as a contempt of Court. There is no doubt about the proper way of serving a warrant of arrest, but equally also no doubt as to the way in which notice of its issue may be communicated. It has been done in the present case precisely in the manner in which notice of an order for an injunction is transmitted in the Chancery Division, namely, by telegraph. In that Division, though a formal injunction is no doubt obtained by the party, yet the means of communication, by telegraph, having become more rapid, it is employed by the Court. Every one knows that in matters of business he cannot with safety disregard a notice given by telegraph, so also it must be understood that a litigant cannot disregard a notice sent to him by telegraph by an officer of the Court. This is so even if there were reason to doubt the authenticity of the telegram, though then inquiry should be made. But in this case nothing can be more flagrant than the conduct of the owner of the *Seraglio*, who appears to have very distinctly pursued this line of conduct in order to test the law. I think I am taking the most lenient view I can of the matter by accepting his apology, but I shall not do it again in any other case, and I condemn the defendant in the costs of this motion.

Solicitors for plaintiffs: *Botterell & Roche.*
Solicitors for defendant: *Miller, Smith, & Bell.*

(1) 13 Ch. D. 110.

E. S. R.

1884
Dec. 6.

[IN THE COURT OF APPEAL.]

HARVEY *v.* LOVEKIN, otherwise HARVEY.

Practice—Divorce—Interrogatories to Party to Suit—Nullity of Marriage—Jurisdiction of Divorce Division—Supreme Court of Judicature Act, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 23—*Interrogatories necessarily criminating—Felony.*

In a suit for nullity of marriage, the Court has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the Ecclesiastical Courts, which had power to allow interrogatories to be administered between the parties, and now all the jurisdiction of the Ecclesiastical Courts as to suits for nullity of marriage (including matters of practice and procedure) is vested in the Probate, Divorce, and Admiralty Division. And, further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, and Admiralty Division by the Supreme Court of Judicature Act, 1873; for at the time of passing that statute the Superior Courts of Common Law and the Court of Chancery had power to allow interrogatories to be administered between the parties to a suit; and by s. 16, all the jurisdiction of those Courts, including the ministerial powers and authorities incident thereto, was transferred to and vested in the High Court of Justice, and by s. 23 the jurisdiction transferred to the High Court may (so far as regards procedure and practice) be exercised in the same manner, as it might have been exercised by any of the Courts whose jurisdiction has been transferred.

Leave to administer interrogatories ought not to be refused on the ground, that it is plain from the nature of the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of felony: he may, however, decline to answer them.

Semble, that inasmuch as proceedings for divorce and for other matrimonial causes are excluded from the operation of the Rules of the Supreme Court, 1883, by Order LXVIII., r. 1 (*d*), an application for leave to administer interrogatories between the parties to a suit ought not to be made to a registrar of the Divorce Division; but it ought to be made in the first instance to one of the judges of the Court.

Suit for nullity of marriage by the husband.

Par. 1 of the petition alleged that on the 20th of February, 1875, the petitioner went through a ceremony of marriage at St. Peter's Church, Croydon, Surrey, with Julia Lovekin, then described as a widow, and since falsely called Julia Harvey.

Par. 2 alleged cohabitation between the respondent, Julia Lovekin, and the petitioner, and further alleged the births of children.

Par. 3. Prior to the date of the ceremony of marriage aforesaid, to wit, on the 9th day of June, 1870, the said Julia Lovekin (then Julia Jackson, spinster) was lawfully married to Louis Anthony Lovekin, at the parish church of St. Marylebone, Middlesex.

Par. 4. On and after the 20th day of February, 1875, the said Louis Anthony Lovekin was alive.

Answer of the respondent, Julia Harvey:—

Par. 1. She denies that she was married to Louis Anthony Lovekin, as alleged. If there was any such ceremony of marriage, it was wholly void. At the time of the alleged marriage to Lovekin, the respondent was then the wife of Ulric J. Edward George, who was then alive. The said U. J. E. George died before February, 1875.

Par. 2. She denies that on or after the 20th of February, 1875, Louis Anthony Lovekin was alive.

Reply of the petitioner:—

Par. 1. At the time the respondent was married to the said L. A. Lovekin she was not the lawful wife of U. J. E. George.

Par. 2. If the respondent was ever lawfully married to the said U. J. E. George, he was not living at the time when the respondent was married to the said L. A. Lovekin.

Par. 3. The said U. J. E. George did not die before February, 1875.

Par. 4. The petitioner takes issue generally upon the answer.

Rejoinder of the respondent to paragraphs 1, 2, 3, of the reply:—

Par. 1. She joins issue upon these paragraphs.

The petitioner obtained leave from a registrar to administer the following interrogatories to the respondent:—

(1.) How old are you, and when and where were you born? (2.) Who was Ulric John Edward George? (3.) Who were his parents? (4.) Where did he live, and during what periods? (5.) If he had any trade, or profession, or employment, state what it was. (6.) When and where do you allege that you were married to the said U. J. E. George? (7.) Where were you and the said U. J. E. George respectively residing at the date of that alleged marriage? (8.) In what building and in what manner

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was the said marriage celebrated? (9.) By whom and in whose presence was the said marriage celebrated? (10.) Did you ever, and if so when and where and up to what date, live and cohabit with the said U. J. E. George? (11.) When did you last see or hear from the said U. J. E. George? (12.) When and from whom did you last hear of him? (13.) At the times alluded to in the last two questions where was the said U. J. E. George, and what was he doing? (14.) When and where did the said U. J. E. George die, and where was he buried? (15.) Were you on the 9th day of June, 1870, or at any other and what date, married to Louis Anthony Lovekin, or to any other and what person, at the parish church of St. Marylebone, in the county of Middlesex? (16.) Were you at that time a spinster, and was your name Julia Jackson? If not, state what your true name and description then were. (17.) After the said marriage, when, where, and during what time did you live with the said L. A. Lovekin? (18.) Did you go to America with him? if so, when and by what ship? (19.) When and where did you separate from the said L. A. Lovekin? (20.) When did you last hear of, or have any and what communication from the said L. A. Lovekin, and where was he then? To the best of your knowledge, have any of your relatives heard of or received any communication from the said L. A. Lovekin since that time? if so, who, when, and where? (21.) Is the said L. A. Lovekin now living? if so, where is he? if dead, when and where did he die?

The order of the registrar giving leave to the petitioner to administer interrogatories was affirmed by Butt, J., and the respondent to the petition thereupon appealed to the Court of Appeal.

Frank Safford (*R. A. McCall*, with him), for the respondent to the petition. This is a suit for nullity of marriage on the ground that before her marriage with the petitioner the respondent had been married to L. A. Lovekin, who was still alive; the answer of the respondent is substantially that her marriage with L. A. Lovekin was void, because she had previously been married to U. J. E. George, who was then alive, but had died before her marriage to the petitioner. For the respondent it will be con-

tended, first, that in a suit for nullity of marriage, the Court has no power to give leave to administer interrogatories of any kind; and, secondly, if the Court has the power, the interrogatories proposed to be administered are inadmissible, because the respondent cannot answer them without criminating herself.

As to the first point, it must be admitted for the respondent that in *Euston* v. *Smith* (1) it was held by Sir James Hannen that in a suit for nullity of marriage the Court had power to order interrogatories; but that decision cannot be supported, and is not binding upon this Court, and ought to be overruled. The Divorce Division has no power to allow interrogatories to be administered; its jurisdiction in matters of procedure and practice depends upon 20 & 21 Vict. c. 85, and none of the enactments in that statute allow interrogatories to be administered between the parties. Sect. 22 merely transfers to the Court of Divorce the principles and rules of the Ecclesiastical Courts. Sect. 43 confers upon the Court power to order the attendance of the petitioner for the purpose of being examined or cross-examined in court. Sect. 46 relates to the examination and cross-examination in open court of the parties and of the witnesses. Sect. 47 relates to the examination, upon interrogatories or otherwise, of witnesses who are out of the jurisdiction of the Court, or who from illness or other circumstances are unable to attend in open court. The Evidence Further Amendment Act, 1869 (32 & 33 Vict. c. 68), s. 3, renders the parties to any proceeding instituted in consequence of adultery competent to give evidence; but it does not render the parties to the suit liable to be interrogated. It is a novelty in procedure to examine the parties in matrimonial causes except in open court. So far as can be ascertained on behalf of the respondent, the practice of administering interrogatories to the parties did not prevail until after the passing of the Supreme Court of Judicature Act, 1873. By s. 5 of that statute the judge of the Court of Divorce became a judge of the High Court: by s. 16 the jurisdiction of the Court of Divorce was transferred to the High Court: by s. 18 of the Supreme Court of Judicature Act, 1875 (38 & 39 Vict. c. 77), the rules and orders of the Court of Divorce were to remain in force; but the rules of the

(1) 9 P. D. 57.

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Court of Divorce did not empower either a judge or a registrar to allow interrogatories between the parties to be exhibited. In the present case the interrogatories purport to be administered under the Rules of the Supreme Court, 1883, Order XXXI., and hence they have been allowed in the first instance by a registrar: Order LIV., r. 12; but by Order LXVIII., r. 1, "proceedings for divorce or other matrimonial causes" are excluded from the operation of the Rules of the Supreme Court, 1883.

[BRETT, M.R. It is plain that those rules do not refer to matrimonial suits.]

For the reasons above given it is submitted that the Divorce Division has no jurisdiction to allow interrogatories of any kind to be exhibited between the parties.

As to the second point, even if the jurisdiction does exist, these interrogatories ought to be disallowed, for they must necessarily criminate the respondent; they do not merely tend to criminate her. They are vexatious on general grounds: the sole object of administering them is to compel the respondent to criminate herself by admitting that she has been guilty of felony, for the real defence to the present suit is that her former marriage with Lovekin was bigamous. These interrogatories would not have been admissible before the Judicature Acts, and therefore they are not admissible now: *Hunnings* v. *Williamson.* (1)

[BRETT, M.R. It is unnecessary now to pronounce an opinion whether that case was correctly decided; it was an action to recover penalties; the suit before us is of a different kind.]

If the interrogatories are not of such a nature as necessarily to criminate the respondent, they are irrelevant for the purposes of the present suit.

W. T. Barnard, for the petitioner. It had been held before the Supreme Court of Judicature Act, 1873, that the Court of Divorce had power to grant inspection of documents: *Winscom* v. *Winscom and Plowden* (2); *Pollard* v. *Pollard and Hemming.* (3) Surely the Divorce Division must now have power to allow interrogatories to be administered between the parties: it has all the powers and all the jurisdiction of any Court that has been

(1) 10 Q. B. D. 459.

(2) 3 Sw. & Tr. 380, at p. 388, n.

(3) 3 Sw. & Tr. 613.

absorbed into the High Court; thus, the Divorce Division has power to grant an injunction: *Noakes* v. *Noakes and Hill* (1): it has power to entertain an equitable defence: *Marshall* v. *Marshall.* (2) In some circumstances any one Division of the High Court may have all the powers as to practice and procedure of any other Division; thus in *Besant* v. *Wood* (3) it appears that Jessel, M.R., allowed the defendant in an action in the Chancery Division to counter-claim for a judicial separation. This was a decision of an extreme nature; for matrimonial suits were formerly within the exclusive jurisdiction of the Ecclesiastical Courts, and did not fall within that of the Court of Chancery. The Queen's Bench Division and the Chancery Division have jurisdiction to allow interrogatories to be administered; and it follows that the same power must exist in the Divorce Division.

BRETT, M.R. The first question is, whether in a suit for nullity of marriage interrogatories of any kind can be administered. Suits of this description were within the jurisdiction of the Ecclesiastical Courts; and when power was given by 20 & 21 Vict. c. 85, to the Court of Divorce to entertain them, it was merely the transfer of an old jurisdiction to a new tribunal. Had the Ecclesiastical Courts power to administer interrogatories? I think that they had. The power to administer interrogatories is a matter not of form, but of jurisdiction. Witnesses could be examined by interrogatories, and the parties to a suit might be treated as witnesses. This view as to the jurisdiction of the Ecclesiastical Courts is strongly fortified by a passage in Hare on Discovery, ch. 5, s. 5, pp. 88, 89 (2nd ed.), where it is laid down that the Court of Chancery would not compel discovery to assist the administration of justice in another Court, if that Court could itself compel the discovery required, and "on this ground a discovery to be used in the Ecclesiastical Courts has been denied." In support of this position, *Dunn* v. *Coates* (4) is cited; that case had reference to a suit in the Ecclesiastical Court for a church-rate, and Lord Hardwicke, L.C., said that the Court of Chancery

(1) 4 P. D. 60.
(2) 5 P. D. 19.
(3) 12 Ch. D. 605, at p. 610.
(4) 1 Atk. 288.

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"will not admit a bill of discovery in aid of the jurisdiction of the Ecclesiastical Court, because they are capable of coming at that discovery themselves." It appears from these authorities that the Court of Chancery recognised the power of the Ecclesiastical Courts to grant discovery, and it declined to assist in obtaining discovery a party to a suit in those Courts, because they themselves had the jurisdiction required. But even if the practice of administering interrogatories did not prevail in the Ecclesiastical Courts, it is conferred upon the Probate, Divorce, and Admiralty Division as to divorce matters by the Supreme Court of Judicature Act, 1873. That Division in all its branches is a part of the High Court of Justice: the Courts previously existing have been absorbed into the High Court, and each part of the High Court has all the ministerial powers, duties, and authorities incident to the jurisdiction of those Courts. By s. 16 of the Supreme Court of Judicature Act, 1873, there was transferred to and vested in the High Court the jurisdiction of the Court of Chancery, the Courts of Common Law, and the Courts of Admiralty, Probate, and Divorce, and at least as to practice and procedure by s. 23, "where no special provision is contained in this Act or in any . . . . rules or orders of Court with reference thereto," the jurisdiction transferred to the High Court "shall be exercised as nearly as may be in the same manner, as the same might have been exercised by the respective Courts, from which such jurisdiction shall have been transferred, or by any of such Courts." Pursuant to these enactments, where there is no provision in the statutes or where there are no rules to the contrary, every division of the High Court may exercise the same procedure as was exercised by any of the Courts, whether of Common Law or of Equity, which were absorbed into the High Court. At the time of passing the Supreme Court of Judicature Act, 1873, the Courts of both Common Law and Equity had power to administer interrogatories; therefore I think that leave was rightly given in the present case to administer interrogatories. From what I have said, it will be understood that I found my judgment both on the former powers of the Ecclesiastical Courts and on the construction of ss. 16, 23 of the Supreme Court of Judicature Act, 1873. The cases cited seem to shew that since the passing of that

statute the judges of the Divorce Division have construed that statute in the same manner that I have. The objection taken before us has been as to the jurisdiction to give leave to administer interrogatories; the real question before us is not whether that jurisdiction has in the present case been irregularly exercised, and whether the application ought in the first instance to be made to a judge or to the registrar. The practice of the High Court of Justice as to discovery is now regulated by Order XXXI. of the Rules of the Supreme Court, 1883; but "proceedings for Divorce or other Matrimonial Causes" are excepted from the operation of those rules by Order LXVIII., rule 1. (*d*) We may respectfully suggest that it would be advantageous to make rules expressly empowering the Judges of the Divorce Division to allow interrogatories to be administered; but as the first question which has been argued before us relates only to jurisdiction, I think that the contention on behalf of the respondent to the petition cannot be sustained.

The second question argued before us is that the interrogatories proposed to be administered were inadmissible, because they tended to criminate, or must necessarily criminate, the respondent. That is an objection which cannot be taken at this stage: the answer to that objection at this stage is based upon a general principle; that principle is that the right to refuse to answer a question is the privilege of the witness alone, whether or not he is a party to the suit, and that the proper time for refusing to answer is when he is called upon to answer. This appeal must be dismissed.

LINDLEY, L.J. It was held by at least one eminent judge of the Court of Chancery that the power to administer interrogatories did exist in the Ecclesiastical Courts. A clear opinion to that effect was expressed by Lord Hardwicke, L.C., in *Dunn* v. *Coates* (1), and in *Anonymous Case.* (2) He declined to grant discovery by the process of the Court of Chancery in aid of proceedings in the Ecclesiastical Courts, and the reason was that discovery could be obtained in the Ecclesiastical Courts themselves. The fact, that the jurisdiction was clearly established, no

(1) 1 Atk. 288. (2) 2 Ves. Sen. 451.

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doubt accounts for the circumstance that the question is but shortly noticed in the reports of these two cases. In *Euston* v. *Smith* (1) it was held by Sir James Hannen that in a suit for nullity of marriage the Court had power to order interrogatories: he there said: "I find it to be in accordance with the practice in the Divorce Division to allow interrogatories, and I shall continue to follow that practice." That is an authority directly in point; we might overrule it, but I think that we ought to follow it. The modern practice is founded upon the older practice, which has been carried on and introduced into all the divisions of the High Court by the sections of the Supreme Court of Judicature Act, 1873, to which the Master of the Rolls has referred; the object of those sections may be said to be to enforce a uniform practice. I do not overlook the fact that the Rules of the Supreme Court, 1883, do not apply to proceedings for divorce or other matrimonial causes; but also, I cannot overlook the old practice, and the new procedure, which is founded upon it.

A further objection has been urged to the interrogatories proposed to be exhibited: it has been contended that they are inadmissible, because they must necessarily criminate the respondent, to whom they are to be administered. I think that this objection is removed by the decision of this Court in *Allhusen* v. *Labouchere*. (2) That case shews that the proper time for objecting to these interrogatories is when the respondent answers them; she can decline to give the information required, on the ground that it will tend to criminate her or must necessarily criminate her; she can refuse to admit that she has been guilty of felony. We cannot say that these interrogatories are irrelevant to the questions raised in the suit, and therefore they must be allowed.

Appeal dismissed.

Solicitors for petitioner: *Wood, Bigg & Nash.*
Solicitors for respondent: *Le Brasseur & Oakley.*

(1) 9 P. D. 57. (2) 3 Q. B. D. 654.

J. E. H.

[IN THE COURT OF APPEAL.]

1885
June 16.

THE RHOSINA.

Damage—Harbour Master—Harbour Commissioners—Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 *Vict. c.* 27), *s.* 52.

The *R.*, which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour master, directed the master of the *R.* where she was to be beached. Before the *R.* left the outer harbour S. came on board, and when she arrived near the place where she was to be beached, S. gave orders as to the lowering of her anchor. The *R.* overran her anchor and grounded on it, sustaining damage. The *R.* grounded, and the order was given, outside the jurisdiction of the harbour commissioners, but the spot where the *R.* was to be beached was within their jurisdiction. The Court below found that S. had been negligent in fact:—

Held, by the Court of Appeal, affirming the decision of Sir James Hannen (ante, p. 24), that the commissioners were liable, for under the circumstances the order given by S. was within the scope of his authority as harbour master.

APPEAL from a judgment of the Rt. Hon. Sir James Hannen (ante, p. 24), whereby in an action by the owners of the steamship *Rhosina* against the Falmouth Harbour Commissioners, and one Sherris, their harbour master, he found both liable. The defendants, the commissioners, alone appealed.

The facts are fully set out in the report of the case in the court below. Briefly stated they are that the *Rhosina* was going from Falmouth outer harbour to the inner harbour for the purpose of being beached in order to ship a new propeller. To reach this place she had to proceed over a space of water out of the jurisdiction of the commissioners, and within that of the dock company. She grounded on her anchor in such water in consequence of an order given by Sherris, the harbour master, to let go her anchor, with a view of deadening her way in order to reach the appointed place in the way desired. Such order was also given out of the jurisdiction of the commissioners. Sherris had instructed the master on the previous day where the *Rhosina* was to beach, and came on board on the morning in question, as a friend of the captain, but Sir James Hannen found as a fact that when on board he resumed his functions as harbour master. When he came on board, the *Rhosina* was within the jurisdiction of the

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commissioners, and the place where she was to be beached was also within their jurisdiction. The Harbours, Docks, and Piers Clauses Act, 1847 (10 & 11 Vict. c. 27), of which s. 52 (1), is material, was incorporated in the Falmouth Harbour Order, 1870, by which the harbour commissioners were incorporated, which was confirmed by the Pier and Harbours Orders Confirmation Act, 1870 (33 & 34 Vict c. clviii.).

Cohen, Q.C., and *Kennedy*, for the appellants. At the spot where the order was given the commissioners had not jurisdiction. By the Falmouth Docks Act, 1859 (22 Vict. c. xvi.) and the Falmouth Docks Act, 1874 (37 & 38 Vict. c. clxxviii.), the dock master, if any one, would have authority here. Next, this order was not one which the harbour master had authority to give, it was given with respect to the navigation of the ship, which is not part of his duty. He came on board simply as a friend of the master, and not in an official capacity. If it was an order within the scope of the harbour master's authority the damage arose through the crew not doing their duty properly.

Webster, Q.C., Sir W. Phillimore, and *Barnes*, for the respondents, were not called on.

BRETT, M.R. The first question which arises in this case is what was the harbour master doing, and, next, whether his act was within his authority as harbour master. He wished the *Rhosina* to be beached in a particular part of the harbour, and in a particular manner, namely, stern first. Certain impediments were found to be in the way of this being done, unless the *Rhosina* could be manœuvred in a particular manner. So, in order to get to the desired spot stern first, the harbour master told those controlling the *Rhosina* to let go the anchor till it touched the ground, and to let the tugs go in a particular direction, and by

(1) Sect. 52: The harbour master may give directions for all or any of the following purposes (that is to say): For regulating the time at which, and the manner in which, any vessel shall enter into, go out of, or lie in or at the harbour, dock, or pier, and within the prescribed limits, if any, and its position, mooring or unmooring, placing, and removing whilst therein:

For regulating the position in which any vessel shall take in or discharge its cargo, or any part thereof, or shall take in or land its passengers, or shall take in or deliver ballast within or on the harbour, dock, or pier.

that means he considered that she would come on in the desired way. Wishing to put this vessel on the strand in a particular manner, he is thus trying to regulate the way in which she shall lie, and to put her in a particular place. He was, therefore, doing something within s. 52 of the General Act of 1847. It was, however, first suggested that the dock master, and not the harbour master, was the proper person to give orders, since the vessel at the time was within the ambit of the dock company's authority. But in reality the dock master had no such power, for this ship was not going to do anything about which he had the right to give orders. For the dock company had no property in the water, and the ship was merely passing over a place which was the property of the company, but she was not going into dock. On the contrary, she was going to a place where the harbour commissioners had authority. As I have said, the place where the order was given was not within the authority of the commissioners, as appears clear from 22 Vict. c. xvi., s. 19, and 37 & 38 Vict. c. clxxviii., s. 8. But, if an order is given for the purpose of placing a vessel where the harbour master has authority, such order need not be given within the actual water where the commissioners have authority.

Then it is said that this man Sherris was a friend of the master of the *Rhosina*, and that in what he did on board of her he acted as such and not as harbour master. The learned judge came to the conclusion that possibly he went on board the *Rhosina* in a friendly capacity, but he finds that when the ship came near to the place in question, Sherris resumed his functions of harbour master. Whether he did so is a question of fact. Not only are we always reluctant to overrule the judge of first instance on such a question as this, but in the present case we agree with Sir James Hannen's view of this point. It is very doubtful if the harbour master would have been fulfilling his duties if he had not been present on such an occasion as this, but whether that be so or not, if, being present, he saw anything going wrong with the manœuvring of the vessel, or if he changed his mind as to the position in which the vessel should lie, he could and ought to resume his office. It is clear that in the present case he could and did resume it.

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This being so, the next question which arises is whether the orders which he gave were proper ones, and this is a question of navigation on which we have sought the advice of our assessors. [The learned judge then stated the questions put to the assessors, with their answers to the effect that the orders of the harbour master were quite wrong, and proceeded:—] Under these circumstances the judgment of the learned President is right both in law and fact, and this appeal must be dismissed with costs.

BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellants: *Pritchard & Sons.*
Solicitors for respondents: *Ingledew, Ince, & Colt.*

E. S. R.

June 17.

[IN THE COURT OF APPEAL.]

THE STANMORE.

Sailing Rules—Collision—Probability of Risk—Regulations for Preventing Collisions at Sea, Art. 18.

The *S.* and the *C.* were approaching each other at night on opposite courses, so as to pass starboard to starboard. The master of the *C.* saw the green and white lights of the *S.*, somewhat more than a quarter of a mile distant, coming into line. This indicated a probability that the *S.* was porting, which would cause a risk of collision; soon after the red light of the *S.* was seen. The engines of the *C.* had been previously stopped, but the master did not reverse her engines till the red light of the *S.* was seen; the vessels soon after came into collision:—

Held, that the *C.* was to blame for infringing art. 18 of the Regulations for Preventing Collisions at Sea, because as there was a probability of risk of collision when the master of the *C.* saw the green and white lights of the *S.* coming into line, he should, being aware of such probability, have then reversed the engines of the *C.*

APPEAL from a decision of the Rt. Hon. Sir James Hannen, whereby he held both the *Cornwall* and the *Stanmore* to blame for a collision which took place off the Yorkshire coast at about 12.30 A.M. on the 9th of September, 1884.

The owners of the *Cornwall* appealed.

The facts stated on behalf of the appellants and admitted by the

respondents' counsel were: That the night was thick with rain, and that the two vessels were approaching each other on opposite courses, green light to green light; the master of the *Cornwall* was on the watch and saw the green light and mast-head light of the *Stannore* about half a mile distant, on his starboard bow, and they got broader on this bow. When the *Stanmore* had got about three points on his starboard bow the master of the *Cornwall* stated in his evidence that he could see by her lights that the *Stanmore* was altering her course, for the green and mast-head lights were getting more into line with each other, apparently shewing that the *Stanmore* was porting. The engines of the *Cornwall* had been stopped some time previously on hearing the whistle of a vessel, which proved to be the *Stanmore*. Afterwards the master of the *Cornwall* saw the red light as well as the green light of the *Stanmore* and at once ordered his engines full speed astern. The green light of the *Stanmore* was shut out, but again became visible, and then the engines of the *Stanmore* were put full speed a-head and the helm put hard-a-starboard, but the *Stanmore* struck the *Cornwall* on the starboard side abaft the beam.

Sir W. Phillimore, and *Bucknill*, for the appellants. The learned President having found the *Stanmore* to blame has likewise held the *Cornwall* to blame for not reversing sooner, and thus infringing art. 18 (1) of the Regulations for Preventing Collisions at Sea. This decision is wrong as regards the *Cornwall*, for her master was not bound to reverse her engines, when what he saw shewed that there was a probability that the *Stanmore* had ported, but when he saw the red light of the *Stanmore*, and a position of risk was indicated to him. Not reversing the engines of a vessel when there is a possibility of danger is not an infraction of art. 18. (1) The master was not bound to assume that the *Stanmore* would continue to do wrong if she had begun to do so: *The Beryl.* (2) He must take time to form an opinion as to whether it is necessary to reverse: *The Emmy Haase.* (3)

(1) Art. 18. Every steamship when approaching another ship so as to involve risk of collision shall slacken her speed or stop and reverse if necessary.

(2) 9 P. D. 137.

(3) 9 P. D. 81.

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Hall, Q.C., and *Roscoe* (*Barnes* with them), were not called on.

BRETT, M.R. In this case two vessels were meeting at night as nearly as possible on opposite courses, and in such a position that they would pass starboard to starboard, and therefore if each had kept her course there was no danger of collision. One of them, the *Stanmore*, ported, and thus did wrong. But it is not sufficient in order to make the *Cornwall* also to blame for this collision to say that the *Stanmore* ported, and had thereby brought about danger of collision, and that the *Cornwall* should have taken some action in consequence; it should be further shewn that the officer on the watch on board the *Cornwall* ought to have been aware of the danger and that he took no proper steps to avoid it, in order to be blameworthy. It was at a little more than a quarter of a mile from the *Cornwall* that the *Stanmore* ported. We have therefore put this question to our nautical assessors: "If the *Stanmore* ported at a little more than a quarter of a mile (being in the position she was), on the starboard bow of the *Cornwall*, did that produce risk of collision?" They answer "Yes." Then the question arises, was such risk of collision so shewn to the officer on the *Cornwall* that he ought in consequence to have acted? He saw the white and green lights of the *Stanmore* coming more into line, and this produced an effect on his mind. Then "would the fact of the white and green lights so coming into line indicate to the master of the *Stanmore*, as a sailor, that in all probability the *Stanmore* had ported?" We put this question in these words to our assessors and they answer "Yes." Therefore we arrive at this result, which sailors must remember, that if in all probability a vessel has done something which, if in fact she has done it, will produce risk of collision, a person who is aware of the fact of this probability of risk ought to consider that there is risk. I think that to insure the safety of ships, which is the great object of these rules, when an officer is put in such a position as I have pointed out, which was the position of the master of the *Cornwall*, he ought to endeavour to avoid the risk by taking some action. That action is indicated by art. 18 of the Regulations for Preventing Collisions at Sea, and therefore in the

present case the master of the *Cornwall* should not only have stopped her engines, but have reversed them, when he saw the green and white lights coming into line, and not have waited till the red light appeared.

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BAGGALLAY and BOWEN, L.JJ., concurred.

Appeal dismissed.

Solicitors for appellant: *T. Cooper & Co.*
Solicitors for respondent: *Ingledew, Ince, & Colt.*

E. S. R.

THE SOLWAY.

July 16.

Evidence—Admission by Master of Ship—Letter.

A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated; but the opinion of the master in such a letter is not evidence.

ACTION for breach of contract by reason of the non-delivery of certain goods belonging to the plaintiffs and shipped to be carried by the defendants' vessel *Solway* from Archangel to London. The *Solway* in the course of her voyage ran ashore in the White Sea, and was lost.

Reid, Q.C., and *Barnes*, for the plaintiffs.

Sir W. Phillimore, and *Green*, for the defendants.

In opening the case for the plaintiff, Reid, Q.C., proposed to read a letter, written by the master of the *Solway* to his owners, which gave certain facts relating to the loss, and stating his opinion as to the cause of it, and to put this letter in as evidence during the progress of the case.

Sir W. Phillimore objected to the admissibility of this letter as evidence. This letter is not admissible; it was no part of the duty of the captain to write an account of the occurrence to his owners. It has been decided that admissions made to a receiver of wreck under 17 & 18 Vict. c. 104, s. 449, are not evidence: *Nothard* v. *Pepper* (1); *The Little Lizzie* (2); and, therefore,

(1) 17 C. B. (N.S.) 39. (2) Law Rep. 3 A. & E. 56.

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admissions made by the master after the occurrence, in a letter to his owners cannot be evidence.

Reid, Q.C., for the plaintiffs. Admissions made by an agent to his employer in the course of his duty have always been received as evidence. The verbal admissions of a master of a ship have been received as evidence: *The Manchester.* (1) *Nothard* v. *Pepper* (2) is distinguishable, for in that case the admissions were not made to an employer in the course of the servant's duty, but to a third person by virtue of a statute.

Sir W. Phillimore, in reply.

SIR JAMES HANNEN. I am of opinion that this evidence is admissible. As regards the case of *Nothard* v. *Pepper* (2), Mr. Reid has met the difficulty which at one time I felt about it. There, the statement could only be admissible if made so by statute, for it was not made by the servant to his employer, but to a person in authority with a limited jurisdiction. It seems to me that this case comes within a leading rule of the law of evidence, for it is clear that the log of a vessel is admissible in evidence by the other side, to shew what entries have been made by the agent of the owners of the vessel on which the log is kept. This letter comes within the same rule; it is part of the duty of the captain to report to his owner all the circumstances which occur when in charge of his vessel. There is clearly no difference whether he puts his statements into the log or sends them by letter. I therefore admit this letter, but with this qualification, that it is necessary to discriminate between the particular parts of it. For the portions of it which are evidence are the statements as to what the captain did or saw, or what orders he gave, but those which consist of his opinions are not evidence.

Evidence admitted.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*
Solicitors for defendant: *Turnbull, Tilly & Mousir.*

(1) 1 Wm. Rob. 62. (2) 17 C. B. (N.S.) 39.

E. S. R.

THE MERCHANT PRINCE.

1885
July 18.

Sailing Rules—Collision—Regulations for Preventing Collisions at Sea, arts. 2 and 11.

A ship shewed a flare-up light to a steamer approaching on her starboard side:—*Held*, not an infringement of arts. 2 and 11, as such light was not calculated in the circumstances to mislead the approaching vessel.

ACTION for damages by collision.

The collision in question took place on the 20th of April, 1885, about midnight, in the Straits of Gibraltar, between a sailing ship, the *Hans Gude*, and a steamer, the *Merchant Prince*. The owners of the sailing ship were the plaintiffs in the action. It was alleged by the owners of the *Merchant Prince*, in their statement of defence, inter alia, that the *Hans Gude* shewed a flare-up light, though she was not an overtaken vessel, and that this being an infringement of art. 11 of the Regulations for Preventing Collisions at Sea, the *Hans Gude* was to blame. It was admitted by the *Hans Gude* that she was not an overtaken vessel, and that she shewed a flare-up light to warn the *Merchant Prince*, which was approaching her on the starboard side. The other questions in the case were questions of fact only.

Sir W. Phillimore, and *Stubbs*, were for the plaintiffs.

Finlay, Q.C., *Barnes*, and *Baden-Powell*, were for the defendants.

SIR JAMES HANNEN. The first question which I have to determine is one of law, namely, as to the construction of the Regulations for Preventing Collisions at Sea. It has been contended on behalf of the *Merchant Prince* that the exhibition of a flare-up light is forbidden except in two cases—one when a vessel is being overtaken, in which case it is shewn astern, and the other, in the case of fishing vessels. With regard to art. 11, it is to be observed that it says that, "A ship which is being overtaken by another shall shew from her stern to such last-mentioned ship a white light or a flare-up light." That does not of itself forbid the use of a flare-up light in other cases. It is also to be observed that the word which is there used is "shew." Now the rule

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which is relied on as proving that the flare-light is not to be shewn unless under the circumstances above mentioned is art. 2, which says: "The lights mentioned in the following articles numbered 3, 4, 5, 6, 7, 8, 9, 10, and 11, and no others, shall be carried in all weathers from sunset to sunrise." I am of opinion that this article does not mean that no other lights shall be shewn on any occasion, but that no other lights shall be carried as fixed lights than those mentioned. The difference in the language of the two rules indicates that it was not intended that the same thing should be meant by the two words "carried" and "shewn." I may state, though of course it does not influence my construction of the rule, that the Trinity Brethren inform me that that has always been, so far as their experience goes, the construction which has been acted upon by nautical men, and that in practice the shewing of a flare-up light has been usual, if circumstances made its exhibition judicious. Therefore it always becomes a question depending on the circumstances whether or not the shewing a flare-up light is calculated to mislead. Of course if it is, and in consequence of that misleading an accident happens, the blame must be attributed to the vessel exhibiting the flare. That it must depend on the circumstances is shewn further by this, that the rules contemplate the use of the flare-up light for trawling, dredging, and fishing-boats; and though it has not been suggested that the *Hans Gude* was in such a position that she could be supposed to be a fishing vessel, it shews that there are circumstances in which it becomes necessary for a vessel which sees a flare-up light to consider whether the vessel which exhibits it is an overtaken vessel, or whether she is a fishing vessel. [The learned President then examined the evidence in the case, and came to the conclusion that with more care and a better exercise of judgment on the part of those on board the *Merchant Prince* they would have seen that the *Hans Gude* was approaching them, and that they were not overtaking her, and he pronounced the *Merchant Prince* alone to blame.]

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *T. Cooper & Co.*

E. S. R.

[IN THE COURT OF APPEAL.]

1885
July 21.

THE CHRISTIANSBORG.

Lis alibi pendens—Stay of Proceedings—Action in rem—Bail.

The plaintiffs, the owners of the German vessel *J.*, commenced an action in rem against the Danish vessel *C.* in an Admiralty Court in Holland, in respect of a collision on the high seas, and the *C.* was arrested in this action. The plaintiffs' agent in Holland and the Dutch Court allowed the *C.* to be released on the underwriters of the *C.* guaranteeing to the parties interested to the amount of 175,000 gulchen, for the compensation which the *C.* might eventually have to pay by legal decision in Holland. While these proceedings were pending in Holland, the plaintiffs began an action in rem in England in respect of the same collision, and the *C.* was arrested in the English action. On a motion by the defendants for the release of the *C.*—the plaintiffs on such motion expressing their willingness to cease proceedings in Holland and pay the costs—Sir James Hannen held that the *C.* ought to be released, as it was primâ facie oppressive to institute an action in another Court in respect of the same subject-matter when there was no evidence that the Court, in which the action was first brought, would not do full justice to the plaintiffs:—

Held, on appeal, by Baggallay and Fry, L.JJ., that the decision of Sir James Hannen was right, for bail being the equivalent of the ship, and it having been given in Holland, an action in England against the ship should not be allowed to proceed at the same time as the Dutch action:

Held, also, that if the guarantee given in Holland was not equivalent to bail, but was a private agreement, the arrest of the ship in England was against good faith:

Held, by Lord Esher, M.R., that the decision of Sir James Hannen was wrong, because though it was not primâ facie oppressive to institute an action in a foreign and in an English court in respect of the same collision, it would be oppressive if bail were given in both courts, but in this case the guarantee not being equivalent to bail, the plaintiffs had not so good a remedy in Holland as in England, and were therefore entitled to bring an action in the English Admiralty Court.

McHenry v. *Lewis* (22 Ch. D. 397) approved and applied.

ADJOURNED SUMMONS and a motion for the release of the Danish vessel *Christiansborg*, which had been arrested in an action by the owners of the cargo lately laden in the German steamship *Jessica*, and by the owners of the *Jessica* in a second action. Both actions arose out of a collision on the high seas between the *Jessica* and the *Christiansborg*, by which the *Jessica* had been sunk. The *Christiansborg* was arrested in an action by the owners of the *Jessica* and her cargo, in Holland on the 15th of June, 1885, and

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commenced on that day in the Royal Court of Holland. The agents of the *Christiansborg* gave a guarantee in 300,000 marks on the 22nd of June, in the following form:—

"Copenhagen, 17th June, 1885.

"We the undersigned, the private underwriters in Copenhagen, hereby guarantee to the parties interested in the steamer *Jessica* of Hamburg and to her cargo up to the amount of 175,000 gulchen for the compensation which the steamer *Christiansborg* may eventually have to pay by legal decision in Holland.

"(Signed) The private underwriters,

"pp. Ed. Hordt & Son,

"Carlwill."

This being satisfactory to one Van Oppen, the plaintiffs' agent in Holland, the *Christiansborg* was released, as if bail had been given, on the 22nd of June. The *Christiansborg* came to England, and on the 11th of July an action was commenced by the owners of the cargo of the *Jessica*, and the *Christiansborg* was arrested, and subsequently an action was begun by the owners of the *Jessica*. A summons for an order to release the vessel was heard in Chambers on the 14th of July, and was adjourned sine die on certain representations by the Plaintiffs' solicitor as to the non-continuance of the action in Holland.

It was stated, however, in the affidavits filed on behalf of the defendants, that proceedings were being continued by the plaintiffs in Holland, that cross proceedings had been taken, and that the plaintiffs could not, according to the opinion of the legal advisers of the defendants in Holland, discontinue the action in Holland.

The summons was now brought on again in court, together with a motion to the same effect, in the second action. The plaintiffs' agent, one Schmidt, in Germany, made an affidavit that the *Christiansborg* had been arrested in Holland by his orders; that proceedings were commenced in this country because he disapproved of the guarantee given, and because the bail was, in his opinion, null and void in Holland, and because there were great difficulties in trying such an action as this in Holland, and that he had no intention of continuing proceedings there.

July 17. *Sir W. Phillimore*, and *Stubbs*, were for the plaintiffs. *Myburgh*, *Q.C.*, and *Nelson*, were for the defendants.

Myburgh, *Q.C.*, in support of the motion. There is a lis alibi pendens in a competent foreign Court, and therefore this Court will stay the proceedings here to prevent the defendants from being harassed by double proceedings: *The Catterina Chiazzare* (1); *The Peshawur*. (2) Further, it was, so to say, on the understanding that the defendants' vessel should be free to continue her voyages that she was released. To arrest her here in a fresh action is therefore to nullify the release in Holland.

Sir W. Phillimore, for the plaintiffs. The plaintiffs had a right to elect which of two tribunals they would seek to obtain judgment in, and they chose the English one, and if they did this the Court will not stay proceedings here: *The Mali Ivo*. (3) There has been a good reason shewn why proceedings should be taken by the plaintiffs in this country, and as they are not vexatious the Court will not stay them, simply because there is also a suit pending abroad arising out of the same subject-matter: *McHenry* v. *Lewis* (4): *Peruvian Guano Co.* v. *Bockwoldt*. (5) The plaintiffs undertake to discontinue the action in Holland, and to pay the defendants' costs.

SIR JAMES HANNEN. This question comes before me in the same manner as it did in chambers, as I adjourned it only in the hope that the parties would come to some terms. The principle on which I think that this question should be determined is, that where an action has been brought in one court, and it is not shewn that such court would not do justice, it is primâ facie oppressive to institute an action in any other court. In this particular case no facts are brought to my knowledge to shew that the Dutch Court would not do full justice, and as full justice between these two foreign ships as the English Court. It is simply stated that when what had been done in Holland came to the knowledge of some one here, he objected, although the agent of the plaintiffs there was perfectly satisfied. The agent of the plaintiffs in the English proceedings says that there

(1) 1 P. D. 368.
(2) 8 P. D. 32.
(3) Law Rep. 2 A. & E. 356.
(4) 22 Ch. D. 397.
(5) 23 Ch. D. 225.

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are great difficulties in proceeding with the suit in Holland, but he does not say what they are. But his allegation is contradicted, and I have no doubt that justice will be as much done in Holland as here. It is clear then that there is a lis alibi pendens, for a suit was instituted by the plaintiffs in a Dutch court against this vessel, which they found within the jurisdiction of the Dutch Courts. Of course they could have brought an action here, if they had good cause for so doing, but, as I have already pointed out, they do not show any such good cause. It is true the plaintiffs have expressed their willingness to abandon the action which is pending in the Dutch court, but in the meanwhile the defendants, who were compelled to come into the Dutch court, have naturally taken cross-proceedings, and the Dutch Court therefore is seised of the litigation, and without the consent of the Dutch Court, and until it has dismissed the action, and has said that it cannot entertain it, it is a lis alibi pendens in Holland. The defendants' vessel was also held to bail in Holland, the plaintiffs in so doing exercising a plain right; security, satisfactory to the plaintiffs' agent in that country, was given, and thereupon the vessel was released. By that release it was plainly meant, that the vessel was to continue on her voyage and be useful in any part of the world to her owners, and not merely that she was at liberty to navigate Dutch waters. But the plaintiffs, by commencing an action here and arresting this vessel here, have set at naught this theory, though they have in Holland a security according to the law of that country and satisfactory to the plaintiffs' agents in that country. The plaintiffs seem to think that they may arrest this ship wherever they find her, and so defeat the object of giving bail in Holland. It appears to me, therefore, that justice requires that both suits instituted in this country should be stayed, and that the vessel should be released. In so doing I am not, in my opinion, acting contrary to the authorities which have been cited. The order must be made with costs.

July 18. The plaintiffs appealed.

Sir W. Phillimore, and *Stubbs*, for the plaintiffs.

Myburgh, Q.C., and *Nelson*, for the defendants.

Cur. adv. vult.

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July 21. LORD ESHER, M.R. In this case a suit was instituted in an Admiralty Court in Holland against a ship in respect of a collision, and in that suit the parties, unless the proceedings in the Admiralty Court in Holland differ from those in the Admiralty Division here, have done that which is contrary to the practice of the Court. Instead of taking a bail bond to the court, they have taken a guarantee as between themselves. The plaintiffs in Holland have now instituted an action in the Admiralty Division here against the same ship for the same collision. A motion was made in the English action to stay the proceedings here, upon the ground that there was an action pending in Holland between the same parties, for the same cause of action. The plaintiffs in this court offered to elect at once to abandon the proceedings in Holland, and to proceed only here. They also offered to cancel the bond and guarantee, to give it back, and to pay the costs of the proceedings in Holland. But Sir James Hannen declined to allow the plaintiffs to elect, and stayed the proceedings here absolutely, so that the plaintiffs could never proceed in this country. The question is, was the learned President right in so doing?

This was a collision between two foreign ships on the high seas, but the defendant's ship has come into an English port and has been seized by the marshal of the Admiralty Division. I have no doubt that the Court here has full jurisdiction to try the case. The question therefore must be, when the plaintiffs have brought an action in a Court in this country which has jurisdiction, whether the Court will prevent them from continuing that action. Now what are the rules which have been laid down, in my opinion with perfect correctness, and in a manner which is binding on this Court? There is the case of *McHenry* v. *Lewis* (1) decided in 1882. It was there argued that the mere fact of proceedings being pending in a foreign court was sufficient in itself to cause a Court here, in which an action for the same matter as between the same parties was pending, to stay proceedings here. Counsel went indeed so far as to allege that the Court would not have jurisdiction. The late Master of the Rolls gave a most important judgment, which I should have thought would have settled the law.

(1) 22 Ch. D. 397.

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He said "the question is whether or not when an action is brought by a man in this country against a defendant, and the same plaintiff brings an action in a foreign country against the same defendant for the same cause of action, this Court has jurisdiction in a proper case to stay the action in this country on the ground that the defendant is doubly vexed by reason of the action being brought also in the foreign country." Then he deals with the case of *Cox* v. *Mitchell* (1) in a way which is binding upon us, and then he proceeds: "If the true view of the judgment is, that primâ facie a man is not doubly vexed when the action is brought in the two countries, but that you want a special case to shew that he is doubly vexed, then there is no conflict of opinion." That is, in other words, to say that where the two actions are in two different countries, and that is all which can be alleged primâ facie, there is no vexation at all and the Court ought not to interfere. It ought not even to put a party to his election primâ facie at all, but leave him to go on and see in which suit he can get execution first. "As regards the second point, it appears to me that very different considerations arise where both the actions are brought in this country and where one of them is brought in a foreign country. In this country where the two actions are by the same man in courts governed by the same procedure, and where the judgments are followed by the same remedies, it is primâ facie vexatious to bring two actions where one will do." So that even where it is in courts that have precisely the same procedure, precisely the same remedies in the same country, even then it is only primâ facie vexatious, and he adds that "this has been recognised, I believe, for ages by the practice of the old Court of Chancery." Now what did the old Court of Chancery do even in the strong case which is there named? It put the plaintiff to his election. It did not stay the action without giving him an election, nor did it refuse to allow him to elect on any terms, but merely put him to his election. "But," to quote the same judgment again, "where it is in a foreign country, it certainly appears to me that we cannot draw the same inference. Not only is the procedure different but the remedy is different." I should think that the learned judge there meant to say "may be different." Then in another

(1) 7 C. B. (N.S.) 55.

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part he shews how it might be different, but it is unnecessary to allude to it.

We have therefore the late Master of the Rolls drawing a strong distinction between the case of the proceedings being in two countries or in the same country. Where they are in the same country, he only says it is a primâ facie case of vexation, or where it is a case of vexation he says that the Court of Chancery had never done more than put a man to his election. Then Cotton, L.J., says (p. 406): "The distinction between proceedings where they are both in the same tribunal, and when one is in England and the other is abroad has already been pointed out by the Master of the Rolls, and that may explain why it is of course when both the actions are in England, and not of course when one is in England and the other abroad." Then the Lord Justice lays down the way in which the jurisdiction is to be exercised: "But here, under the circumstances of this case, ought we to exercise a jurisdiction which I assume we have, and to make the order? In the first place, it is a jurisdiction which one ought to exercise with extreme caution. Stopping in the middle of a suit a plaintiff from going on when he has a right of action as against the defendants, is a jurisdiction which has to be exercised with very considerable caution." Then he goes on to discuss the particular case: "But I cannot say here that we ought to come to the conclusion, which is the principle on which the jurisdiction is to be exercised, that proceeding with these two suits in the two different tribunals is vexatious. It may be harassing no doubt, because it is very harassing to have an action brought against one in any tribunal at all, but that is not enough. It must be vexatiously harassing the defendant on the part of the plaintiff, whose action is sought to be stayed." Then Bowen, L.J., says (p. 408): "I think that *Cox* v. *Mitchell* (1) decided nothing more than that, it simply lays down the proposition that the mere pendency of an action abroad is not a sufficient reason for staying an action at home, although the causes of action and the parties may be the same." And then further on Bowen, L.J., says: "The fact that no English action has ever yet been stayed on the ground of concurrent litigation in America is a strong argument to prove that

(1) 7 C. B. (N.S.) 55.

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such concurrent American litigation is not by itself a sufficient reason why an English action should be stayed." Now he speaks of America as the strongest case he can find, because the laws of America are as nearly as possible the same as the laws of England and are founded upon the same law. Again he says: "It is clear not merely from reason, but from the language of Lord Cottenham and Lord Cranworth referred to by Cotton, L.J., that this Court could do it if necessary for the purposes of justice; but some special circumstances ought surely be brought to the attention of the Court beyond the mere fact that an action is pending between the same parties on the same subject matter in America." That seems to me to lay down the law that there is jurisdiction in the Court, but that it ought only to be exercised with the greatest caution. Where both actions are in England in the same tribunals —because if they are in tribunals where the proceedings are not identical or the remedies are not equally effective the law would apply which is applicable to foreign countries—primâ facie it is vexatious, and therefore it would lie on the party who brings the second action to shew that it was not so. But where the cases are in foreign countries, primâ facie not being vexatious, the man who says it is, must prove clearly to the Court that it is, and that the person suing him in a court with ample jurisdiction would have in every respect the same chance in a foreign court which he has here, and equal facility to enforce the remedy. Then there is the case of *The Peruvian Guano Company* v. *Bockwoldt* (2), in which the motion was that the plaintiff might be ordered to elect, not that proceedings should be stayed. Indeed I can find no case in which the Court has stayed the second action without giving the plaintiff at least the right of election. Again, the late Master of the Rolls says: "It is very important that in these cases the Court should clearly see that in stopping an action it does not do injustice." I have already stated that learned judge's opinions in a previous case, and I now therefore refer to those of Lindley, L.J., who says (p. 232): "Where the plaintiff is suing in this country and also abroad in respect of the same matter, and a motion is made to compel the plaintiff to elect, it is not sufficient for the person so moving to point out that there are two proceedings being

(1) 23 Ch. D. 225.

taken with reference to the same matter; he must go a step further and show that there is vexation in point of fact, that is to say, that there is no necessity for harassing the defendant by double litigation." In other words, he must show that there is no necessity. Then he continues: "If in any case it is established that there is nothing except vexatious litigation, there is ample jurisdiction in this Court to make the order asked." And Bowen, L.J., says (p. 234): "We have no sort of right, moral or legal, to take away from a plaintiff any real chance he may have of an advantage. If there is a fair possibility that he may have an advantage by prosecuting a suit in two countries, why should the Court interfere and deprive him of it?"

Those cases to which I have referred had dealt with cases in the Admiralty Court, as to which I must say that they are not satisfactory. Take the case of *The Peshawur* (1), which was an action in personam against the owner of the ship. It appeared, as stated in the head-note, that a "cause of damage in rem relative to the same collision had, prior to the proceedings in this court, been instituted by the owners of the *P.* against the *G.* in a Vice-Admiralty Court abroad, and was then pending." That is all that was shewn to the Court. Sir R. Phillimore stayed the proceedings here, but he gives no reason for so doing, so that it is a decision contrary to the decision of the Court of Appeal. But it seems that the parties intended to appeal, but settled the dispute before doing so, and I cannot regard this case as any authority. Then there is the case of *The Mali Ivo* (2), in which Sir R. Phillimore declined to interfere entirely. But the learned judge made statements which have since been relied on; he says that he has a discretion, which may be admitted. Then he further says: "I am aware that it has been decided by the Court of Common Pleas, in the case of a foreigner against whom an action of contract was pending in his own country at the suit of the plaintiff, and who came over to this country and was sued here by the plaintiff for the same demand, that the pendency of the action in the foreign country was not a sufficient ground for staying proceedings in the action here: *Cox* v. *Mitchell* (3); and I have considered that part of the case of

(1) 8 P. D. 32.

(2) Law Rep. 2 A. & E. 356.

(3) 7 C. B. (N.S.) 55.

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The Bold Buccleugh (1) which refers to this subject." If we take those words literally, as I am inclined to do, I agree with them. Then he continues: "I have come to the conclusion that it would be my duty either to suspend proceedings in this court or to put the parties to their election"—if that is to be read together as one thing, it gives the parties their election, and if they refuse to exercise it, to stay proceedings I think would be right. He continues:—"as to which court they would have recourse to, if indeed the evidence established that there was a lis alibi pendens before a tribunal which could afford the plaintiff a complete remedy, whether the proceedings were instituted in rem or in personam." If the meaning of that is to afford as complete a remedy and as easily enforced as the remedy in the court, and if it means to say that the persons claiming to put the other side to election in this case must satisfy the Court of that, then it is in accordance with the case in the Court of Appeal, and is right, but not otherwise. In *The Catterina Chiazzare* (2) the learned judge seems to have exercised his jurisdiction on the mere ground that there was a case pending in Ireland. If we take Ireland not to be for the purpose in question a foreign country, but assume that the Court in Ireland will give the same remedy as this Court, that case is be supported on the ground that primâ facie there was vexation, and this primâ facie case was not met by any offer of the person suing in the second court. This view of that case would make it consistent with the cases decided in the Court of Appeal. In the present case the Court is asked to stay the proceedings here in consequence of proceedings in Holland. Admiralty Courts are in my opinion municipal courts of the country in which they exist, exercising, by consent of all nations, the maritime law which is the common law of all nations upon the high seas. The Admiralty Court in Holland is therefore a municipal court of a foreign country. That being so, it is not vexatious, according to the authorities, to have instituted suits in two courts, one being a foreign court. But I think that Admiralty Courts are not within the full authority of the proposition as to foreign courts, because the way in which they exercise their jurisdiction in all counties, as far as I know, is by seizing the ship and

(1) 7 Moore, P. C. 267. (2) 1 P. D. 368.

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by letting her go on bail being given according to the practice of the court. If bail, therefore, be given in one court, and when the action is instituted in the other bail is to be given again, I think that that could not be allowed, if the party who sues in the second court insists on preserving the bail in both courts.

I think it would be vexatious in fact to call upon the owner of the ship in respect of the same cause of action to give bail in the two courts at the same time. In such a case the party who objects to the action proceeding in the second court has satisfied to a certain extent the burden of proof, which lies upon him, and has shewn that it would be vexatious to allow, without terms, the matter to go on in a second court upon that ground. But the English Court cannot be satisfied without ample and satisfactory evidence that the procedure in a foreign Admiralty Court is in all respects the same as that in the English court, and that the person suing in the foreign court has the same chance and facilities of effective success as he has in this court. So that it is only if bail be given that it is oppressive to proceed in an English court at the same time as in a foreign court. Were it not, therefore, for this question of bail, it seems to me that an English Court would exercise its jurisdiction by allowing both actions to proceed at the same time, but when bail is given would not allow it. Then what should the Court do when bail is given? It would be exercising its jurisdiction not with caution, but with extreme rashness, with the chance of inflicting injustice, if, upon the mere fact of bail being given in a foreign court, they were to prevent a man from giving up that bail, from paying the costs of the foreign action, and from going on with his action in this country. But the present case is stronger, for either the proceedings in Holland are shewn to be different from those in the English Admiralty Court, and the plaintiffs will have no chance or possibility of obtaining judgment with effect in Holland; or, on the other hand, the proceedings in Holland are the same as those here. Then it is clear that after the release of the ship upon the guarantee between the parties an English Court of Admiralty would not try the case. A Court will not proceed to try a case so as to make itself ridiculous, and inasmuch as in an action in rem the mode of enforcing the judgment is by enforcing

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a bail bond entered into with the Court, it would not proceed when the ship has gone, where no bail bond has been given to the Court, and where there is nothing but the guarantee between the parties, which is a mere personal contract, which the Court of Admiralty would not enforce. So that if this Court stops the plaintiffs from proceeding here, it deprives them of the right of effective litigation and judgment here, and leaves them to go on in Holland where the Court, if the procedure is the same as here, will not further entertain the litigation, and then the plaintiffs are helpless, because they have only obtained a guarantee from the defendants to pay, if the Court of Admiralty decides that the *Christiansborg* is to blame, and the plaintiffs will have no remedy in any court. To stay the proceedings here would therefore be an act of injustice. But if the Dutch procedure is different from ours, is it the same thing to have a judgment in Holland which can only be enforced by the guarantee of a third party—a mere contract? Is that as effective a remedy as a judgment here, after bail has been given to the satisfaction of the Court? I am sure it is not, and therefore to stay the proceedings here is to act contrary to the two decisions of this Court, which have laid down a distinct and practical rule, and would be to inflict an injustice on the plaintiffs in this action. I therefore think that the judgment of the President should be reversed.

BAGGALLAY, L.J. I regret to differ from the Master of the Rolls, more especially as the consequence of this decision are so serious for the parties.

I take it to be established by a series of authorities that where a plaintiff sues the same defendant in respect of the same cause of action in two courts, one in this country and another abroad, there is a jurisdiction in the Courts of this country to act in one of three ways,—to put the party so suing to his election, or, without allowing him to elect, to stay all proceedings in this country, or to stay all proceedings in the foreign country—it is not in form a stay of proceedings in the foreign court, but an injunction, restraining the plaintiff from prosecuting the proceedings in the foreign country, which of course cannot be enforced against him if he is a foreigner, and is neither present in this country nor

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has property here. It is an injunction which may become inoperative, but that is how the proceedings in the foreign Court may in effect be stayed. The principle of election is clearly expressed in the case of *McHenry* v. *Lewis* (1), the marginal note of which case correctly represents the decision. The judgment there drew a distinction between the two actions being brought in English courts, and a case in which one action is brought in a British court and the other in a foreign court, and the distinction is that which I draw in this case, that primâ facie it is vexatious to sue the same party in two different actions in two British courts, but that it is not necessarily so where one of the actions is in a foreign court. You must examine into the circumstances of the case, and see whether, under the circumstances, it is as vexatious as it would be assumed to be, if the same actions had been commenced in two British courts. That I take to be the effect of *McHenry* v. *Lewis* (1); the Court will of course consider whether the plaintiff should be put to his election, but the circumstances of the case may be such that instead of putting the plaintiff to his election the Court will stay one of the two actions. Whether you adopt the principle of putting him to his election or of staying the proceedings in one of the courts, must depend on the circumstances of the case. I take it that there is no question that the Court can in the manner I have pointed out stay the foreign action, if the circumstances warrant it, but there is no doubt that where the Court has stayed one of the actions it has been most usually that in the English court. The proceedings to which I have referred were well recognised in the Court of Chancery before the Judicature Acts, and it appears from one of the cases referred to by the Master of the Rolls to have been acted on by the Admiralty Court. But since the passing of the Judicature Acts those general powers are exerciseable by each branch of the High Court. The principles enunciated in that case were also referred to by Sir George Jessel in the terms already referred to by the Master of the Rolls. From that case, it is clear that the decision of the Court must depend on whether it is vexatious to bring the same proceedings under the particular circumstances. Then there is the case of *The Mali Ivo* (2), in which Sir R. Phillimore

(1) 22 Ch. D. 397. (2) Law Rep. 2 A. & E. 356.

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more refused the application to stay proceedings on the merits, as there was in his view no suit pending between the litigants on the same subject before him as in the Austrian Consular Court, but he expressly recognised the jurisdiction of the Court to interfere if necessary, by suspending the proceedings in one court or putting the plaintiff to his election.

In the case of *Peruvian Guano Co.* v. *Bockwoldt* (1) I have no doubt that the Court of Appeal were of opinion that no sufficient case was made out to cause them to make such an order as was prayed for. There the application was to make the plaintiffs elect whether they would proceed in the French or the English action, and it was refused for the reasons which appear very distinctly from the latter part of the judgment of Lindley, L.J. If that case was rightly decided, I really am unable to distinguish between the circumstances of that case and those which we are now considering. With regard to them I am unable to see the distinction, in principle at least, between a ship being released upon bail in the ordinary form and being released by virtue of an agreement come to between the two owners or their representatives. The *Christiansborg* went to sea a free ship, and she might have entered into a charterparty for another voyage, and she is in fact under an engagement for the charterparty as from the 1st of August, and it may be that whilst she was a free ship that charter was entered into. She was therefore put into the position of a free ship by those entitled to retain her in Holland.

Being a free ship she has come into an English port, and she may have done that for the very purpose of carrying out the charterparty which she had entered into. I think these may be regarded as the particular circumstances of this case. If it were merely one of double proceedings, it might be quite right to put the parties to their election. But that which led to this ship coming to and being arrested in an English port was the agreement entered into between the representatives of the owners at a Dutch port, in consideration of which she was released, and moreover a contract might have been entered into for the performance of which the ship would have been responsible. If that ship is detained and not allowed to go to sea, she will be unable to carry

(1) 23 Ch. D. 225.

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out her contract, and she will be responsible, though she was allowed to leave Holland upon a guarantee, which must be taken to be sufficient. The difficulties on one side or the other are great, whether the ship be released or not, and I think that the parties who have brought about the difficulties by not allowing the case to proceed in the Dutch court are the parties who ought to suffer, and not the others. I therefore think that the judgment of Sir James Hannen was right.

FRY, L.J. I think that the judgment of Sir James Hannen is right, and I come to that opinion without, as it seems to me, in any way infringing the principles laid down by this Court either in the case of *McHenry* v. *Lewis* (1), or *Peruvian Guano Co.* v. *Bockwoldt.* (2) The ground on which I think the learned President is right is this: that, in my judgment, the institution of the action in the Admiralty Court in this country was against good faith. I come to that conclusion from the evidence of Mr. Schmidt himself, who is conducting this action on behalf of the plaintiffs, and he tells us in effect that the ship was arrested in Holland, that a letter of guarantee was given to Mr. Van Oppen, whom he describes as acting on behalf of the owners of the *Jessica*, and this letter Mr. Van Oppen considered satisfactory and therefore released the ship. Now there are two ways in which that transaction may be viewed: the first as equivalent to the giving of bail in the Dutch Admiralty Court. What is the effect of giving bail? It seems to me that bail is the equivalent of the res, and that whilst the bail has been given for the thing, it is, if not impossible, highly improper that another action should be allowed to go on against the res in any other place. I cannot but observe that it appears to me that where the matter in controversy is a ship, the business of which carries it from jurisdiction to jurisdiction, very different considerations may apply to the existence of suits in two jurisdictions to those which apply to ordinary actions in personam. I think, therefore, that when bail has been given, the plaintiff in the foreign action, the first action, has obtained that which is equivalent to the arrest of the res. The same conclusion, it appears to me, may be arrived at in

(1) 22 Ch. D. 397. (2) 23 Ch. D. 225.

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another way. The result of the giving of bail is the release of the ship. Now, what is the meaning of releasing a ship under the circumstances? It appears to me that the meaning of it is, that she is released from all rights and claims against her in respect of the collision, which is the cause for which her owners have been compelled to give the bail. Therefore, without saying it is impossible that a second action should be allowed where such a release has been obtained, I think that the existence of such a release is the most cogent circumstance against allowing the prosecution of a second action. That is the view of Sir James Hannen, because he says: "Now what is the meaning of the release? It plainly must mean, everybody would understand it to mean, that the vessel was to go on her course and be useful to her owners, and earn freight, and not merely that she was to sail about in the Dutch waters." If that be, as I think it is, the true meaning of a release obtained by the giving of bail, it seems to me that the subsequent institution of this suit is against good faith. In my judgment, also, extreme inconvenience would follow if the practice were allowed of instituting proceedings in rem in whatever port the ship might happen to arrive: the result would, or might, be that in the case of a collision a vessel might be arrested afresh in every jurisdiction which she might enter, and that even though bail might have been given in the courts of foreign jurisdiction, so that she would be harassed from port to port by successive actions of the kind which we have now before us, and the plaintiff might be allowed to elect which of the antecedent actions he would prosecute.

It may be contended, however, that the proceeding in the present case is not the giving of bail, but the acceptance of a guarantee given by certain persons and accepted by Mr. Van Oppen, who in consideration of the guarantee so given, released the ship. In that point of view we have before us a private convention, an agreement between the litigants, and in consideration of that agreement the plaintiffs have given a release to the ship. Now, no doubt, one may imagine mistake, miscarriage, and many other circumstances which might render such an arrangement inoperative, and it might under these circumstances constitute no bar to a future action. But there are no such circumstances in

the present case. The release had been purchased, so to speak, by the giving of the guarantee. It is suggested that that guarantee may be inoperative, but the remarkable circumstance is that Mr. Schmidt, who is acting for the plaintiffs in this country and was advised, no doubt, by his solicitor what case he must make out, does not suggest that the guarantee is inoperative, or give any reason why he desires to be free from it or to repudiate it. It has also been suggested that Van Oppen may not have had the authority to justify him in accepting the guarantee and releasing the ship. But Mr. Schmidt does not suggest that there was any defect in Van Oppen's authority to do either of these things. I think, therefore, that we are bound to consider that there was an agreement between the litigant parties by which, for valuable consideration, the owners of the *Christiansborg* purchased the release of their vessel from the claims of the owners of the *Jessica*. Consequently, they having thus obtained a release, which was intended to be operative, the institution of the action in the Admiralty Court in England is against good faith. For these reasons I think that the appeal must be dismissed.

Appeal dismissed.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Lowless & Co.*

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THE NUMIDA.

Ship—Arrest—Commission on Bail Bond—Damages.

Commission on bail is not part of the defendant's costs in an action of salvage or damage, but it may be recovered as damages from the plaintiff where the arrest of the vessel is made maliciously, or with gross negligence.

Appeal in the first case from the decision of Sir James Hannen upon a summons taken out by the defendants, the owners of the *Collingrove*, in a salvage action. A collision occurred between the *Collingrove* and the steamship *Colstrup*, in which both vessels sustained damage. After the collision the *Colstrup* towed the *Collingrove* into port. Cross actions were brought in respect of the collision, and the owners, master, and crew of the *Colstrup* also entered a salvage action against the *Collingrove* in respect of services rendered to the *Collingrove* after the collision. In the last action an appearance was entered, and a bail bond was given in the ordinary course for the sum of 1500*l.* Upon the trial of the cross actions of damage, the *Colstrup* was found solely to blame, in consequence of which the salvage action was abandoned. The defendants thereupon applied to Sir James Hannen in chambers for an order that the bail bond be delivered up to be cancelled, and that the plaintiffs pay the fees and costs of the same. The President made the order as prayed, and the plaintiffs appealed therefrom to the Divisional Court.

The Numida was a damage action in which an appearance was entered, and a bail bond, to the extent of 20,000*l.*, given by the defendants. The action was abandoned before trial, and on taxation the defendants claimed, as part of their costs, the sum of 200*l.*, being the amount of commission on the bail bond at the usual rate of 1*l.* per cent. The matter came before the President in chambers on objection to the taxation, and was by him adjourned into Court, and ordered to be argued at the same time as the appeal in the *Collingrove*.

July 21. *Hall, Q.C.*, for the plaintiffs in the *Collingrove* action.

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There is no necessity for this order, as the abandonment of the action ipso facto cancels the bond. The application is in reality simply an attempt on the part of the defendants to make the plaintiffs pay the commission on the bond, which the Court will not allow: *The British Commerce.* (1) The commission paid is of the nature of damages, not of costs, as the defendants elect to give a bail bond instead of suffering the damage which the arrest of their ship entails upon them; and the Court will not condemn the plaintiffs in the costs and damages occasioned by the arrest of the vessel, unless the arrest was made malâ fide or with crassa negligentia: *The Evangelismos* (2); *The Volant.* (3) If the plaintiff is not liable for the costs incurred by arresting the vessel, why should he be made liable for the costs of the bail bond?

If this commission is to be treated as part of the costs of the action, the precedent will be acted upon in every damage action before the Court. No one has ventured to press this question to the decision of the Court.

There are no special circumstances in this case to cause the Court to deviate from its ordinary practice.

Stubbs, for the plaintiffs in *The Numida* action. Commission on bail is not costs but damages; such commission is never allowed by the Court because it is against its policy to encourage the giving of commission: *Foxall's Bail.* (4)

Baden-Powell, for the defendants in the *Collingrove* action.

Aspinall, for the defendants in the *Numida* action. The Registrar allows all costs incidental to bail, except the commission, which in this case amounts to 200*l.* Is it reasonable on the part of the defendants to pay commission? If they did not put in bail the plaintiffs would have to pay all the marshall's expenses. If reasonable, the commission must be costs in the action in the ordinary and proper course of events. In *The Volant* (3) Dr. Lushington expressly limits his decision to damages; he will give costs, but not damages. In *The British Commerce* (1) Butt, J., held a strong opinion that the costs in a salvage action were not

(1) 9 P. D. 128.
(2) Swa. 378.
(3) Br. & Lush. 321.
(4) 7 D. & R. 783.

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recoverable in a damage action, so that that case does not operate against the defendants here.

Hall, Q.C., in reply.

Cur. adv. vult.

Aug. 4. SIR JAMES HANNEN (President), delivered the judgment of the Court.

In the case of *The Numida*, which was argued before Butt, J., and myself, on a summons adjourned into Court, the question raised was, whether, when a ship has been arrested and held to bail, and the proceedings against her have been discontinued before the hearing, the owners are entitled to compensation for the loss occasioned to them by being obliged to pay commission in order to procure bail for their ship.

It was contended for the defendants that this commission must be regarded as costs in the proceedings in which the giving of bail was an ordinary step. We are, however, of opinion that this contention cannot be supported. It was not suggested that these expenses ever had been treated as costs since the time when the practice of obtaining bail on payment of a commission arose; and we should not be justified in creating a new head of costs.

We think, however, that in some circumstances the commission paid for obtaining bail would be recoverable as damages. This commission is the cost which the owner incurs to obtain the release of his ship, and to avert the damage he would sustain by the continued detention of his vessel. It appears to us, therefore, that this commission might be recovered as damages in those cases, and in like circumstances, in which damages could be recovered for the wrongful arrest of the vessel. It has always been the practice in the Court of Admiralty for the judge to award these damages to the defendant, where upon the trial the facts have shewn that he was entitled to them, without putting him to the necessity of bringing a fresh action for them: see *The Evangelismos*. (1) And it appears to us that where the suit is discontinued the same power nevertheless belongs to the Court, in fitting cases, to award damages to the defendants whose ship has been

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improperly arrested, upon the facts being brought to the knowledge of the Court by affidavit. See the case of *The Orion*. (1)

We do not, however, consider that the bare fact of the proceedings being discontinued entitles the defendant to damages, it is necessary for him to shew that the arrest of the ship was malicious, or the result of gross negligence. This has not been done in this case, and we therefore dismiss the summons with costs. In the case of the *Collingrove*, where the same point was raised, the same result will follow, and the appeal must be allowed with costs.

Solicitors for plaintiffs in the *Collingrove* action: *Downing & Co.*

Solicitors for defendants in the *Collingrove* action: *Ingledew, Ince, & Colt.*

Solicitors for plaintiffs in the *Numida* action: *Waddilove & Johnson.*

Solicitors for defendants in the *Numida* action: *Stoke, Saunders, & Stokes.*

E. S. R.

[IN THE COURT OF APPEAL.]

Aug. 11.

THE BELLCAIRN.

Limitation of Liability—Judgment by Consent—Right of Claim.

In an action for damages by collision between the owners of the *A.* and the *B.*, the Court, by consent of the parties, made a decree dismissing the action. Subsequently another action was brought by the owners of the cargo on the *A.* against the *B.* in respect of the same collision, and the Court found both vessels to blame. The owners of the *B.* then commenced an action against the owners of cargo on the *A.* for the purpose of limiting their liability in respect of all claims arising out of this collision, and paid the amount of their statutory liability into court. Subsequently, again by consent of the owners of the *A.* and the *B.*, the assistant registrar rescinded the decree by consent in the first action, and the owners of the *A.* then brought in a claim in the limitation action against the fund in court. The registrar held such claim to be inadmissible. On motion to confirm the report:—

Held, that the report should be confirmed, as the owners of the *A.* and *B.* could not by consent rescind the decree of the Court, and that the decree by consent was a bar to a claim against the fund in court, as it estopped the owners of the *A.* from bringing any further action against the *B.*

MOTION by the plaintiffs, the owners of cargo lately laden in the *Britannia*, to confirm the report of the registrar, and cross

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motion by the defendants, the owners of the *Bellcairn*, to vary the report. The report, which is as follows, sets forth the facts and the points raised.

"Whereas on the 31st of July, 1884, a collision occurred off Portland between the steamship *Bellcairn* and *Britannia*, and whereas on the 31st day of March, 1885, the Court did by its decree or order pronounce the owners of the *Bellcairn* to be entitled to limited liability according to the provisions of the Merchant Shipping Act, 1854, and Merchant Shipping Act Amendment Act, 1862, and whereas a sum of 10,843*l.* has been paid into court by the owners of the *Bellcairn*, being the amount of their statutory liability aforesaid inclusive of interest. And whereas all claims filed or to be filed upon such fund were referred to the registrar assisted by merchants to report upon, and the time allowed for filing claims has expired.

"Now, I do hereby report that I have with the assistance of Messrs. Sidney & Young and Neville Lubbock, of London, merchants, carefully examined the claims filed in this action, together with all accounts and vouchers and the papers and proceedings produced and brought in, and having, on the 3rd of August, 1885, heard counsel and solicitors thereon I find that loss and damage to ships, goods, merchandise, and other things, have been proved to the extent shewn in the schedule hereto annexed, subject to the question hereinafter stated as to the right of the owners of the *Britannia* to prove against the fund in Court for the damages they sustained. This question arises under these circumstances:—

"On the 1st of August, 1884, an action for damage by the said collision was brought in this division by the owners of the *Britannia* against the owners of the *Bellcairn*, in which the latter also counter-claimed for the damage they sustained.

"After the usual proceedings the case came on for trial on the 7th of November, 1884, and in the course of the examination of the first witness the counsel on either side conferred together, and then asked the judge to make the following decree or order, which was done: 'The judge by agreement of counsel on both sides dismissed the action and the claim and counter-claim, but made no order as to costs.' A week later, namely, on the 13th of November, another action was brought against the *Bellcairn* on

behalf of the owners of the cargo of the *Britannia*, and after the usual proceedings the action came on for trial on the 19th of January in the present year, when the Court found both vessels to blame and pronounced for a moiety of the damages sustained by the plaintiffs. After this, on the 6th of February following, the owners of the *Bellcairn* brought this action against the owners of the cargo of the *Britannia* and others for the purpose of limiting their liability in respect of all damage arising from the collision in question.

"It then appears that on the 7th of March the owners of the *Britannia*, by the consent of the owners of the *Bellcairn*, obtained from the assistant registrar an order in the original action setting aside the decree by which that action had been dismissed; the order being by consent was made as a matter of course in these words: 'Upon consent of both solicitors it is ordered that the judgment dated the 7th day of November, 1884, whereby the plaintiffs' action was dismissed, be set aside.' Thereupon, on the 25th of March, an appearance was entered in this action for the owners of the *Britannia*, who now claim to prove against the fund in court for the damages sustained in the collision.

"This claim is opposed on behalf of the owners of the cargo of the *Britannia* on the following grounds, shortly stated: that the effect of the judgment entered on the 7th of November, 1884, was to extinguish the claim of the owners of the *Britannia* for damages against the owners of the *Bellcairn*; that it cannot be revived by the bare consent of the owners of the *Bellcairn*, who have obviously no interest to maintain that judgment, and who gave such consent behind the backs of the owners of the *Bellcairn's* cargo and other claimants and to their prejudice, and to the prejudice of the judgment which the cargo owners have obtained, since the fund in court will not suffice to pay the moiety of the damage which they have incurred.

"It appears to me that this objection is well founded; but at the request of the parties we have investigated the items of claim on behalf of the *Britannia* also. I have therefore to report that in my opinion the only parties entitled to claim against the fund in court are those whose damages are set forth in items 9 to 25 inclusive in the said schedule, amounting in all to 20,430*l.*;

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but should the Court, on objection being taken, be of opinion that the owners of the *Britannia* are also entitled to prove against the fund, the sums in respect of which they will have established their claim will appear in items 1 to 8 inclusive, and will amount to 17,983*l.*

"Admiralty Registry, Royal Courts of Justice, London, 5 August, 1885. (Signed) H. A. Bathurst, Registrar."

Finlay, Q.C., and *Stubbs*, for the plaintiffs. The order of the 7th of March was made by the assistant registrar without jurisdiction. A formal decree of the Court was drawn up on the 7th of November, and the assistant registrar, even with the consent of the parties, could not rescind such decree. The judgment by consent of November 7th bars the plaintiffs in that action from claiming against the fund paid into court in this action; the sum paid into court under 25 & 26 Vict. c. 63, s. 84, is only answerable to valid claims, and this claim of the plaintiffs is not valid in consequence of the judgment by consent in the first action.

Sir W. Phillimore, and *Aspinall*, for the defendants. The limitation of liability action is a fresh proceeding, having no connection with the previous action, and therefore the judgment by consent on the 7th of November does not bar the plaintiffs' claim in the limitation action. Moreover, such a decree by the consent of the parties can be equally altered or set aside by the consent of the same parties which was the foundation of the formal decree of the Court.

Finlay, Q.C., was stopped in his reply.

BUTT, J. This is the case of a collision between the *Bellcairn* and the *Britannia* in July, 1884. In the course of the hearing of the action between the ships, counsel agreed to a decree, by which the claim and counter-claim were to be dismissed, and there was to be no order as to costs, and that judgment was formally entered. Then, by a proceeding which I do not profess to understand, the solicitors of the parties in that action took a consent to the registry, and drew up an order setting aside the previous judgment. That order ought never to have been made by the

assistant registrar, and no doubt he would not have made it had his attention been called to the facts. It is clear that if after the decree of the 7th of November the owners of the *Britannia* had instituted a second suit against the *Bellcairn*, the previous decree would have been a legal answer to it. But the owners of the *Bellcairn* being sued by the owners of cargo in the *Britannia*, instituted a limitation action, and obtained the usual decree therein. The cargo owners then bring in their claim, and then there comes in a competing claim by the owners of the *Britannia*. I have already pointed out that after the decree of the 7th of November, it was not competent for the owners of the *Britannia* to bring a fresh action against the *Bellcairn*. The sum paid into court in the limitation action represents the ship, it is in fact its statutory value, the 8*l.* per ton being, so to say, a statutory appraisement of the ship. This being so, it is equally impossible for the owners of the *Britannia* to have any valid claim against the money in court, and therefore the contention of the cargo owners of the *Britannia* is right, and the report of the registrar must be confirmed.

Nov. 4. The defendants, the owners of the *Bellcairn*, appealed.

Sir W. Phillimore, and *Aspinall*, for the defendants.
Bricknill, Q.C., and *Stubbs*, for the plaintiffs.

LORD ESHER, M.R. It is clear that if the judgment of the 7th of November, 1884, be valid and standing, the owners of the *Britannia* can have no claim against the *Bellcairn*. The sole question therefore is whether this judgment has been set aside. I agree with Butt, J., that when at a trial the Court gives a judgment by the consent of the parties it is a binding judgment of the Court, and cannot be set aside by a subsequent agreement between the solicitors, or the parties, even though it be placed in the form of an order by consent on a summons and taken to a registrar or master, and by him made as a matter of course. It is only the Court, with full knowledge of the facts on which it is called on to act, which can set aside the first judgment, and I doubt whether, unless some fraud in regard to such judgment is shewn, even the Court would have jurisdiction to set aside its

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first judgment. It is clear then that the second consent order was absolutely void, and would have been of no validity in an action between the *Britannia* and the *Bellcairn*, in which the judgment of the 7th of November was relied on as a bar. For these reasons the appeal must be dismissed with costs.

COTTON, L.J. I am of the same opinion. The judgment of the 7th of November was a bar to any action by the owners of the *Britannia* against the *Bellcairn*, and if such judgment could have been set aside at all, it could only have been done by the Court with all the facts before it. But if an application had been made to the Court to rescind the consent judgment, and it had been informed of the facts, it would not have made the order which the deputy-registrar did, because it is obvious that to set aside the first judgment would prejudice the rights of third parties. Moreover, any party interested in the subject-matter of a judgment has a right to set it up as being a good answer to a claim between the immediate parties, even though, as here, these do not choose to rely on it.

LINDLEY, L.J. I am of the same opinion. I do not believe for a moment that the Court with knowledge of the facts would have rescinded the judgment of the 7th of November, which was done, not to benefit the owners of the *Bellcairn*, but to prejudice third parties.

Solicitors for plaintiffs: *Stokes, Saunders, & Stokes.*
Solicitors for defendants: *Botterell & Roche.*

E. S. R.

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Aug. 4.

Damages—Cargo—Re-shipment—Use of Damaged Cargo.

Plaintiffs' cargo of coals on board the *K.* was damaged by a collision at C., the port of loading, and had to be unloaded. It was ultimately re-shipped and carried on to B., and used by the plaintiffs in smithies, though it was not purchased for this purpose. The shipowner was not willing to ship a fresh cargo except on fresh terms, and the plaintiffs did not ascertain what those terms were. On a reference as to damages, in an action between the owners of the coal and the owners of the vessel with which the *K.* came into collision, the assistant registrar decided that the plaintiffs were only entitled to recover the difference between the value of sound and damaged coal at the port of loading, and that if the value was that at the port of destination it must be taken to be the value of smithy coal. On objection to this report:—

Held, that the shipowner had a right to insist on carrying on the same cargo; that it appearing that he had been willing to take a fresh cargo on fresh terms, it was the duty of the plaintiffs to have ascertained what those terms were, so as to diminish the loss as much as possible, before comparing the loss on the damaged cargo at B., and that from the sale of it at C., and shipping a fresh one:

Held, also, that the coal having been used for a particular purpose, was not a reason for estimating its value at that of coal ordinarily used for such purpose.

Objection by petition and answer to the report of the assistant registrar. The action was brought by the Great India Peninsula Railway Company, the owners of a cargo of coal on board the steamship *Kairos*, to recover damages from the owners of the *Blenheim* in consequence of a collision between the two vessels in Penarth Roads on July 7, 1882. The owners of the *Blenheim* admitted their liability, and the reference as to the damages was held in due course by the assistant registrar and two merchants. It appeared that the owners of the *Kairos* had chartered her to Messrs. Pirie & Co., who made a sub-charter on the 19th of May, 1882, with the plaintiffs, by which the *Kairos* was to proceed to Cardiff and there load a full and complete cargo of coal and proceed with it to Bombay. The *Kairos* took on board 3019 tons of Ferndale smokeless steam coal, and left her berth on July 7th, and on the same day was damaged in the roads by a collision with the *Blenheim*. In consequence of this collision the cargo had to be discharged.

It was alleged by the plaintiffs that of this cargo 1020 tons had

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been more or less damaged by sea water, and the remaining 2000 tons were considerably damaged in being discharged. After a survey had been held, the plaintiffs considered that it would be better to ship a fresh cargo of coals or to replace the damaged by undamaged coals. But though the plaintiffs proposed this to the owner of the *Kairos* and to Pirie & Co., they insisted that they were entitled to re-ship the same cargo. The coal was accordingly re-shipped and carried to Bombay, and it being unfit to be used as locomotive coal, was used by the plaintiffs in their smithies. The defendants denied that the owners of the *Kairos* or Pirie & Co., refused to ship a fresh cargo or to allow the damaged part to be replaced, and further submitted that if they did, the plaintiffs were not bound to obey the dictates of the owners of the *Kairos*, so as to found thereon a claim against the defendants.

The following schedule shows the amounts claimed and allowed.

	Claimed.			Allowed.		
	£	*s.*	*d.*	£	*s.*	*d.*
1. Cargo coal short delivered 77 tons, at 30*s.* a ton . .	115	10	0	30	0	0
2. Damage to cargo by water, 3*s.* 4*d.* a ton on 972.64 tons	162	2	3	600	0	0
3. Damage by excessive breakage, 10*s.* a ton on 2881½ tons	1440	15	0			
4. Survey fee	24	12	0	12	12	0

By his report the assistant registrar in effect stated that the plaintiffs used an erroneous test in measuring the loss by the depreciation of the value of the coal, as if it had been sold by auction at Bombay. Because the coal was for the plaintiffs' own use and it was used in the plaintiffs' smithies, for which they import annually about 2000 tons at a cost of only 6*d.* to 1*s.* less per ton than that of their coal for locomotive purposes. He further stated that another objection was taken to the claim, which, in his opinion, made it unnecessary to determine the amount of depreciation in the coal at Bombay; for the plaintiffs' inspector recommended that for the good of all parties interested the whole cargo should be condemned and sold. This was stated to be the usual way of dealing with damaged cargoes of coal at Cardiff, and it was admitted by the plaintiffs that it would have been the best

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way of dealing with this particular cargo. The reason given for not adopting it was, that the owner of the *Kairos* refused to take any other cargo, than the cargo actually discharged, except, as he stated in his affidavit, "upon fresh terms as to freight, &c." But the plaintiffs did not make any attempts to find out what was meant by fresh terms. No authority was cited for the contention that the plaintiffs were bound to re-ship a damaged cargo at the port of shipment against the advice of their surveyors, nor was it shewn on what reasonable grounds the shipowner could have insisted on re-loading a damaged and possibly dangerous cargo instead of a fresh cargo, which might have been shipped with probably less delay. The assistant registrar therefore concluded that the cargo should have been sold at Cardiff, and that the plaintiffs were only entitled to recover the loss which they would have sustained had the cargo been sold at Cardiff.

He therefore allowed 600*l.*, at the rate of 4*s.* per ton, which he estimated to be the loss at Cardiff on coals the cost price of which was 10*s.* per ton.

July 7. *Barnes*, for the plaintiffs. The damages have been assessed by the assistant registrar on a wrong basis, they should have been assessed on the value of such coal as this in the market at Bombay. The shipowner has a legal right to insist on carrying on the specific cargo for which bills of lading have been signed: *Notara* v. *Henderson*. (1) Therefore, the plaintiffs were bound to re-ship these coals, and were not bound or entitled to put on board another cargo: *Jones* v. *Holm* (2); *Tindall* v. *Taylor*. (3) He also referred to Parsons on Shipping (American ed. 1869), pp. 216, 231.

W. R. Kennedy, Q.C., for the defendants. The report is correct; there was no such insistance in fact, as the plaintiffs allege, on the part of the shipowner. The parties being bound to act in a way to satisfy commercial reason, the shipowner was not entitled to ask that this particular cargo should be re-shipped when his ship could not carry it on as first shipped: *Jackson* v. *Union Marine Insurance Co.* (4); *Stanton* v. *Richardson*. (5) The cases

(1) Law Rep. 7 Q. B. 225, 238.
(2) Law Rep. 2 Ex. 335.
(3) 4 E. & B. 219.
(4) Law Rep. 8 C. P. 572; on appeal, Law Rep. 10 C. P. 125.
(5) Law Rep. 9 C. P. 390.

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relied on by the other side do not support the proposition for which the plaintiffs contend. He also referred to *General Steam Navigation Co.* v. *Slipper*. (1) Even if the plaintiffs' contention is right as to the re-shipment, they have received a sufficient amount for damages, as they used the coal for their own purposes at a very slight loss.

Barnes, in reply.

Cur. adv. vult.

Aug. 4. SIR JAMES HANNEN. This case arose on the plaintiffs' objections to the assistant registrar's report, in which the facts are stated so clearly that I need not recapitulate them. I regret that I cannot adopt the view of the registrar and merchants, as it is a very reasonable one; but I do not think that it can be supported in law. I have no doubt that it would have been better for the cargo, and that it would not have been any disadvantage to the shipowner, if a fresh cargo had been shipped at Cardiff instead of re-shipping the damaged cargo. But I am of opinion that the shipowner was entitled to insist on the original cargo being re-shipped, if it was capable of being carried on, as appears to have been the case. The shipowner has a lien on the cargo for the purpose of enabling him to earn his freight, and the cargo owner is not entitled to insist on delivery of the cargo, without payment of freight, before the completion of the voyage on which the freight is to be earned. Mr. Stamp, the shipowner, was therefore acting within his strict rights in refusing, if he did refuse, to take any other cargo than that which was actually discharged. It does not appear, however, that Mr. Stamp absolutely refused to take a fresh cargo, he only refused to do so except on fresh terms as to freight, &c. What these fresh terms were is not shewn. It is pointed out by the assistant registrar that it did not appear that the plaintiffs inquired what these terms were, and this no doubt created a difficulty in estimating what the fresh terms as to freight would have been. I agree with the assistant registrar and merchants that it was the duty of the plaintiffs to make inquiry as to these terms, in order that they might be able to form a judgment whether the benefit to be derived from

(1) 11 C. B. (N.S.) 493.

shipping a fresh cargo would not more than compensate for the increased freight, and so diminish the loss for whomsoever it might concern, and in the absence of any inquiry it was to be presumed that the shipowner would not have made use of his position to extort unreasonable terms. Any advance in freight which might have occurred after the signing of the charterparty might therefore have been taken into account in estimating what the loss could have been reduced to, if the plaintiffs had tried, as they ought to have done, to diminish it as much as possible. I am of opinion, therefore, that the assistant registrar's estimate of the damage is not based on a correct principle, and that it is necessary to ascertain or estimate what would have been the increased freight payable in respect of a fresh cargo, before comparing the loss which resulted on the damaged cargo at Bombay with the loss which would have arisen on the sale of that cargo at Cardiff, and shipping a fresh one. I am also of opinion that the value of the coal to the plaintiffs at Bombay ought not to be estimated at the price which the plaintiffs pay for coal for their smithies, merely because they used this coal for the purposes of their smithies; but that the true question is, to what extent was the heating power of the coal reduced. Although it was in fact used by the plaintiffs in their smithies, it may have been of less value than that which they were accustomed to buy at 1*s.* or 6*d.* per ton less than they paid for coal for locomotive purposes.

Solicitors for plaintiffs: *Waltons, Bubb, & Johnson.*
Solicitors for defendants: *Pritchard & Son.*

E. S. R.

1884
Nov. 11.

WOODS *v.* WOODS.

Judicial Separation—Jurisdiction of Magistrates—Aggravated Assault—Matrimonial Causes Act, 1878—24 & 25 *Vict. c.* 100, *s.* 43.

If a husband has been convicted of an aggravated assault the magistrates may grant a judicial separation, even though they do not fine or imprison him.

THIS was an appeal from an order made by justices of the peace for Kingston-on-Thames on the 26th day of October, 1882.

The order appealed from was as follows:—

"Whereas George Woods, of Thames Ditton, in the county of Surrey, hereinafter called the husband, was this 26th day of October, 1882, at Kingston-on-Thames, in the county of Surrey, duly convicted summarily before the undersigned . . . . of an aggravated assault within the meaning of the statute 24 & 25 Vict. c. 100, s. 43, committed upon Susannah his wife, that is to say, that the said husband in the month of June, 1882, at the parish of Thames Ditton, in the said county of Surrey, unlawfully did assault and beat the said wife, such assault and battery being of such an aggravated nature that it could not, in our opinion, be sufficiently punished summarily under the provisions of the said last-mentioned Act as to a common assault and battery, and whereas we, the said justices, are satisfied by evidence on oath in the presence and hearing of the said husband and wife, that the future safety of the said wife is in peril, and whereas the marriage of the said parties is duly proved before us: Now we, the said justices, do order that the said wife shall henceforth be no longer bound to cohabit with the said husband, and we further order that the said husband shall from and after the 26th of October, 1882, pay to the said wife the sum of 1*l.* per week . . . . and we further order that the legal custody of the seven children, being under the age of ten years, be henceforth given to the said wife."

Crispe, for the appellant. This case is not within s. 4 of the Matrimonial Causes Act, 1878 (41 & 42 Vict. c. 19). (1) The

(1) 41 & 42 Vict. c. 19, s. 4:—"If a husband shall be convicted summarily or otherwise of an aggravated assault within the meaning of the statute twenty-fourth and twenty-fifth Victoria, chapter one hundred, section forty-three, upon his wife, the court or magistrate before whom he shall

justices had no power to make the order appealed from; the fact of the appellant's only being fined and condemned to pay the costs shews conclusively that it was not an aggravated assault within s. 43 of 24 & 25 Vict. c. 100 (1); the appellant has really been convicted under s. 42, and therefore the justices had no jurisdiction to make the order of separation.

Lyon, for the respondent, cited *Re Palmer*. (2)

BUTT, J. It seems to me that the reason of the thing is this. The man was found guilty of an assault, and the magistrates thought that the penalties under s. 42 would by themselves be inadequate. But inasmuch as they were going further to order a weekly payment, and also to make an order about cohabitation and the custody of children, they thought they need only impose a nominal fine. The recital in the order seems to me quite sufficient, and the appeal therefore will be dismissed.

Solicitor for appellant: *Thomas Young.*
Solicitor for respondent: *E. C. Kilsby.*

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be so convicted may, if satisfied that the future safety of the wife is in peril, order that the wife shall be no longer bound to cohabit with her husband; and such order shall have the force and effect in all respects of a decree of judicial separation on the ground of cruelty; and such order may further provide" . . .

(1) 24 & 25 Vict. c. 100, s. 43:—"When any person shall be charged before two justices of the peace with an assault or battery .... upon any female .... the said justices, if the assault or battery is of such an aggravated nature that it cannot in their opinion be sufficiently punished under the provisions hereinbefore contained as to common assaults and batteries, may proceed to hear and determine the same in a summary way, and, if the same be proved, may convict the person accused; and every such offender shall be liable to be imprisoned in the common gaol or house of correction, with or without hard labour, for any period not exceeding six months, or to pay a fine not exceeding (together with costs) the sum of twenty pounds, and in default of payment to be imprisoned in the common gaol or house of correction for any period not exceeding six months, unless such fine and costs be sooner paid, and if the justices shall so think fit."

(2) Q. B. D.; 45 Justice of the Peace.

R. A. P.

1884
Dec. 19.

POMERO *v.* POMERO AND HADLEY.

Damages—Condonation.

Condonation of the wife's adultery is no answer to the husband's claim for damages against the co-respondent.

Norris v. *Norris, Lawson and Mason* (4 Sw. & Tr. 237; 30 L. J. (P. & M.) 111) distinguished.

THIS was a husband's petition for dissolution of marriage, and for damages against the co-respondent.

There was no appearance by the respondent, but the co-respondent answered denying the adultery, and by an amended answer pleaded connivance, condonation, and collusion.

The petitioner, in his evidence, admitted that he had condoned his wife's adultery and taken her back to live with him.

Underhill, Q.C., and *Poulter*, for the co-respondent. Condonation of adultery committed by a wife with a particular person is a bar to any proceedings in this division of the court by the husband against that person: *Norris* v. *Norris, Lawson and Mason.* (1)

Israel Davis, for the petitioner. By 20 & 21 Vict. c. 85, s. 33 (2), a husband may petition for damages only. *Norris* v. *Norris, Lawson and Mason* (1), is a decision on s. 34, not on s. 33, and relates to costs only.

[BUTT, J. In that case the Judge Ordinary said: "The petitioner by condoning his wife's adultery with Lawson has waived all right to any proceedings against her in this Court."]

That expression must be read with reference to the circumstances of the particular case.

(1) 4 Sw. & Tr. 237; 30 L. J. (P. & M.) 111.

(2) 20 & 21 Vict. c. 85, s. 33:—"Any husband may, either in a petition for dissolution of marriage or for judicial separation, or in a petition limited to such object only, claim damages from any person on the ground of his having committed adultery with the wife of such petitioner . . . and the claim made by every such petition shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation are now tried and decided in courts of common law."

1884

POMERO v. POMERO.

Underhill, Q.C. The words "such object" in s. 33 refer to either the dissolution or the judicial separation. The claims in this petition stand or fall together.

BUTT, J. I am told that a petition for damages only has occasionally, though rarely, been filed. The Act of Parliament is clear, and I can conceive cases in which great hardship would be inflicted by depriving a husband who had pardoned his wife of all remedy against the adulterer. The Act directs that the claim for damages shall be heard and tried on the same principles, in the same manner, and subject to the same or the like rules and regulations as actions for criminal conversation were at the time of the passing of the Act. Condonation was no bar to the action for criminal conversation, and therefore, although condonation is proved and admitted, the case must go to the jury on the issue of connivance, and, if necessary, to assess the damages.

Solicitors for petitioner: *Atkinson & Dresser.*
Solicitors for co-respondent: *Godfrey & Robertson.*

R. A. P.

M. OTHERWISE D. *v.* D.

1885

March 5.

Impotence, Suits for Nullity of Marriage and Dissolution of Marriage—Cross-examination as to Adultery.

A suit had been instituted for nullity of marriage by reason of impotence, and a cross-suit for dissolution of marriage by reason of adultery:—

Held, that, in the first suit, the petitioner in that suit might be cross-examined as to her improper intimacy with the co-respondent in the cross-suit.

THIS was a petition for nullity of marriage brought by an alleged wife by reason of the impotence of the alleged husband (1). The alleged husband had also in another suit for dissolution of marriage charged her with adultery. Both suits had been set down for hearing, but the suit for nullity was heard first. In the course of the cross-examination of the petitioner in the suit for nullity, questions were put to her as to her adultery with the co-respondent in the other suit.

(1) The facts of the case are reported ante, p. 75.

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M.
v.
D.

Russell, Q.C. (*Pritchard* with him). By s. 2 of 14 & 15 Vict. c. 99, the parties to an action are competent and compellable to give evidence, and the 3rd section of 32 & 33 Vict. c. 68 (1) only excepts parties to a proceeding instituted in consequence of adultery, and this is not a proceeding of that character.

Inderwick, Q.C. (*Searle* with him), contrà. The words of the section are general, and no witness to any proceeding is liable to be asked or bound to answer any question tending to shew that she has been guilty of adultery.

Sir J. Hannen (President). Mr. Justice Stephen in his book on Evidence, p. 111, considers that the word "such" has been omitted by accident from the section of 32 & 33 Vict. c. 68, and as I incline to the opinion that the intention of the section is to limit the inadmissibility to suits instituted in consequence of adultery, the safer course will be to allow the questions to be put.

The witness was then cross-examined at length as to her conduct with the alleged co-respondent.

Solicitors for Petitioner: *Humphreys & Son.*
Solicitors for Respondent: *Lewis & Lewis.*

(1) 32 & 33 Vict. c. 68, s. 3:—"The parties to any proceeding instituted in consequence of adultery, and the husbands and wives of such parties, shall be competent to give evidence in such proceeding: Provided that no witness in any proceeding, whether a party to the suit or not, shall be liable to be asked or bound to answer any question tending to shew that he or she has been guilty of adultery, unless such witness shall have already given evidence in the same proceeding in disproof of his or her alleged adultery."

R. A. P.

HAWKINS *v.* HAWKINS AND HOPE.

1885
July 10.

Divorce—Conduct conducing to Adultery.

A petitioner and respondent separated by mutual consent shortly after the marriage, and only met once afterwards. The petitioner allowed her a small sum for her support, and sixteen years after the marriage discovered that she had committed adultery:—

Held, under the circumstances, that the petitioner had conduced to the adultery. Petition dismissed.

THIS was a petition for dissolution of marriage by reason of the adultery of the wife.

The parties were married on the 13th of July, 1868, at St. James's Church, Piccadilly. The petitioner had become acquainted with the respondent (who was a shop girl) some short time previously, and had been improperly intimate with her, and compelled by her father to marry her. At the time of the marriage the petitioner was entirely dependent upon his uncle and aunt, and it was arranged between him and the respondent that the marriage should be kept secret. A few days after the marriage the parties separated and never cohabited again, the petitioner allowing his wife from 2*l.* to 4*l.* a month, which he remitted to her by letter. They met once at Charing Cross about sixteen years after the marriage, when something was said about living together, but neither party seemed desirous of doing so. With that exception they had not seen each other until shortly before the institution of this suit, when the petitioner discovered that the respondent had for some years been living in adultery. The petitioner's uncle died in 1870, leaving all his property to the aunt, and she died in 1881, bequeathing a considerable fortune to the petitioner.

The respondent's adultery was proved, and she was called as a witness in support of her case.

Inderwick, Q.C., and *Pritchard*, for the petitioner.

Middleton, for the respondent. She has filed an answer alleging that the petitioner has conduced to her adultery, but would prefer that the divorce should be granted.

1885

HAWKINS v. HAWKINS.

SIR J. HANNEN (President.) The petitioner in this case seduced the respondent when she was a young woman, and her father having brought pressure upon him to marry her, the petitioner required her to keep the marriage secret, as if it was known to his uncle and aunt they would not leave him their property; but even after the uncle's death the petitioner continued to live apart from his wife although he introduced her to his aunt as the person whom he intended to marry. Every husband is bound to give his wife that protection which the society of a husband affords, and the fact that the respondent had been familiar with him before marriage made that duty more incumbent upon him, she being a person who might be more likely to yield to temptation. Having regard, therefore, to the petitioner's conduct in leaving his wife without a husband's protection, and being of opinion that that conduct conduced to her adultery, I consider that he is not entitled to a dissolution of his marriage.

Petition dismissed with costs.

Solicitors for petitioner: *Foss & Ledsam.*
Solicitor for respondent: *F. J. Mann.*

R. A. P.

1884
Dec. 16.

A. OTHERWISE M. *v.* M.

Nullity of Marriage—Variation of Settlements.

A marriage having been annulled, the Court ordered all the property of the alleged wife to be reconveyed to her freed from the trusts of the settlement upon the alleged marriage.

THIS was a petition for variation of settlements.

By indentures of marriage settlement certain property of the petitioner, consisting of a share in the New River Company and other stocks, and a reversionary interest in 10,000*l.*, was conveyed to trustees in trust for the petitioner for life for her separate use, and after her death to pay the income, except that derived from the reversionary interest, to the respondent for life, and after the death of the petitioner and respondent, in trust for the issue of the marriage. The marriage had been annulled by a decree

1884

A. v. M.

of this Court at the suit of the petitioner, the wife, and there were no children.

On the 9th of December, 1884, Butt, J., had made an order extinguishing the respondent's interest in the settlements.

Inderwick, Q.C. (*Searle* and *Ingle Joyce*, with him), moved the Court to order the re-assignment of the property to the petitioner for her absolute use free from the trusts of the settlements: *Chapman* v. *Bradley*. (1)

Butt, J. The case of *Chapman* v. *Bradley* (1) is a sufficient authority for the present application, and I therefore make the order asked for.

Solicitors for petitioner: *Few & Co.*

R. A. P.

NOEL *v.* NOEL.

1885

March 24.

Dissolution of Marriage—Variation of Settlements—Costs of Suit.

A marriage had been dissolved at the suit of the husband. By the marriage settlements the wife had certain interests in her husband's property, and had also power to appoint a portion of her own property for the benefit of any husband she might marry after the death of her late husband, and for the children of that marriage.

She and her husband had at present about 400*l.* a year each, but she was entitled to reversionary property of great value, and was liable to pay the costs of the suit.

The Court gave half of the wife's present and reversionary income to the husband for himself and the two children of the marriage, and

Held, that her interest in her husband's property must be extinguished, and that her powers of appointment in favour of a future husband and children must not take effect until after the death of her late husband:—

Held, also, that in varying the settlements the Court must not take into consideration in her favour that she has to pay the costs of the suit.

This was a petition for variation of settlements.

The marriage of the parties had been dissolved by reason of the adultery of the wife. There were two children of the marriage, who were living with the petitioner.

By the marriage settlements the husband's property, which

(1) 4 De G. J. & S. 71.

1885

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consisted of 10,000*l.* invested on mortgage, and reversionary interests in land yielding about 200*l.* a year, was settled in trust for the husband for life, then for the respondent for life, and afterwards for the children of the marriage as the husband and wife, or the survivor, might appoint, and in default for the children equally, and in default of children for the petitioner or his representatives.

The property of the respondent, after a first life interest to her, was settled upon similar trusts to those of the husband's property, except that the ultimate trusts were as she should appoint, and in default for her next of kin; and it was also provided that if she should survive her husband she should be at liberty, in certain events, to appoint a portion of the income in favour of any husband she might marry after the death of the petitioner, and a certain proportion of the capital, for the benefit of the children of such marriage.

The wife's property in settlement consisted of an annuity of 400*l.* payable by her father, and reversionary interests in land yielding about 400*l.* a year, and several sums of money amounting to 26,000*l.*

The incomes of the parties at the present time amounted to about 400*l.* a year each.

The petitioner prayed: (1.) That with reference to the petitioner's property the respondent's rights and interests be extinguished, and the settlement might be read as if she were dead. (2.) That the settlement of the respondent's property be varied so that the income arising during the joint lives of the petitioner and respondent be divided into moieties, one moiety to be paid to the petitioner (with power to the trustees, if they should think fit, to pay any part not exceeding one-half of such moiety for the maintenance and education of the two children), and in case of the petitioner's death in the respondent's lifetime, to be applied for the benefit of the children. The other moiety to be paid to the respondent. (3.) That the trustees should have power during the joint lives of the petitioner and respondent with the consent of the petitioner only; and in the event of the death of the petitioner in the respondent's lifetime, at their sole discretion to raise any part not exceeding 2000*l.* of the expectant

or presumptive share of either child, and apply the same for the benefit of such child. (4.) That the power of appointment in favour of any future husband, and also the power of appointment in favour of the children of the marriage of the petitioner and respondent, which was vested in the respondent, should be extinguished. (5.) That the property devised to the respondent under the will of Miss Kelleman be assigned to the trustees of the settlement, to be held by them upon the trusts as altered by the Court.

The respondent, by her answer, stated that she was liable for the costs of the divorce suit to the amount of 811*l.*, and that she was under twenty-six years of age.

Aug. 5, 1884. *Bayford*, for the petitioner.

Searle, for the respondent.

The trustees of the settlement had been served with the petition, but did not appear.

Cur. adv. vult.

March 24, 1885. SIR J. HANNEN (President). This was a suit brought by the husband for a dissolution of his marriage on account of his wife's adultery. She appears to be entitled to considerable property in reversion on the death of her father and mother and other persons, which was brought into settlement on the usual terms. The husband also brought property into settlement, and with regard to that I think the interest of the wife must be absolutely extinguished as though she were dead. The parties are in receipt of an equal income, about 400*l.*, but the husband has two children to support, and the question which arises therefore is what should be done with the income which the wife enjoys. I am of opinion that half of her 400*l.* a year should be paid over to the husband for the use of himself and his children. The wife urges that she has a large sum, 800*l.*, to pay for the costs of this suit, which she says she ought not be called on to pay if her income is to be reduced. If I were to yield to this appeal I should be transferring the burden of these costs to the husband—the innocent party. I must, therefore, order that the half of the income of the wife be applied to the benefit of the husband and children. With regard to the wife's reversionary

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interest, I am of opinion that half of that income when it falls in must be paid to the husband on this principle: When a woman by her own fault has broken up a family of which she was a part, the Court must endeavour to put the husband and the children, as far as money goes, in the same position as they would have been if she had not broken it up. Therefore I am of opinion that as the husband has to support the children and bring them up, he must have half of her reversionary income. There remain some further questions to be disposed of. The husband and the wife have a joint power of appointment over both settlements among the children. As regards the wife, her power of appointment must be extinguished, because as she will no longer have charge of them she has not the same opportunity of exercising a judgment as to the propriety of making any particular disposition of her property among them. Her power of appointment, therefore, must be extinguished. Then there remain some further powers of appointment reserved by the settlements. There is a power of appointment in favour of her husband in the event of her surviving the petitioner and contracting a second marriage. The husband asks that that power should be extinguished. I am of opinion that it must be extinguished in so far as it gives a power of appointment in favour of any second husband whom she may marry during the petitioner's life; but I should not disturb the existence of that power in favour of a husband whom she may marry after the death of the petitioner. The reason is that the petitioner and his children will not be in any way damnified if her power of appointment is limited to the case of a husband taken after the death of the petitioner. In the same way, as regards the children of a second marriage, supposing she marries during the lifetime of the petitioner, she must have the power of appointing in favour of children born after the death of the petitioner.

Solicitors for petitioner: *Crowder, Anstie, & Vizard.*
Solicitors for respondent: *Kingsford & Dorman.*

R. A. P.

LYNCH *v.* LYNCH.

1885
June 9.

Divorce—Wife's Costs—Security—Attachment—Debtors Act, 1869.

Notwithstanding the provisions of the Debtors Act, 1869, a husband is liable to attachment if he does not find security for his wife's costs of suit.

THIS was a wife's petition for dissolution of marriage.

By an order made in the suit and bearing date the 21st of April, 1885, the respondent had been ordered to pay the sum of 22*l.* 2*s.* 3*d.* costs already incurred, and to pay into the registry, or find security for the sum of 50*l.* to answer the petitioner's costs of the hearing of the suit. The order had been properly served and not obeyed, and affidavits of service and of non-compliance with the order having been filed,

Searle, for the petitioner, moved for attachment.

Pritchard, for the respondent. The Court's jurisdiction as to attachment in such a case has been taken away by the Debtors Act, 1869, Part I., s. 4, and 46 & 47 Vict. c. 52, ss. 103 et seq. This is "default in payment of a sum of money," and the security is merely in relief of the order to pay, and is for the benefit of the debtor. The Court of Appeal seemed in a recent case to be of that opinion, but the question was not formally decided.

Searle, in reply. The respondent in not obeying the order to give security is guilty of contempt.

SIR J. HANNEN (President). I entertain no doubt that the respondent is guilty of a contempt of Court if he has the means and does not find security. What may be the effect of such a contempt is another matter. It has for many years been the practice of the Court so to consider this question, and I must act accordingly and leave the Court of Appeal to alter the practice if it thinks proper. Attachment to issue unless security is given within a fortnight.

Solicitors for petitioner: *Worthington, Evans, & Blaxland.*
Solicitor for respondent: *H. E. Kisbey.*

R. A. P.

1885
Aug. 4.

TINNUCHI *v.* SMART.

Default by Administratrix—Attachment—Debtors Act, 1869.

Letters of administration had been granted to the widow of a deceased person upon the suggestion of intestacy, and she had received a sum of money, part of the deceased's property. The letters of administration were subsequently called in in an action propounding a will of the deceased, and in that action she was ordered to pay the sum of money to the administrator pending suit, which order she had not obeyed :—

Held, that she was not protected by the Debtors Act, 1869, and therefore was liable to attachment.

THIS was a motion for attachment.

John Smart, late of Princes Street, Leicester Square, in the county of Middlesex, engineer, deceased, died on the 7th of January, 1885, and on the 23rd of that month letters of administration were, on the suggestion that he died intestate, granted to Susan Smart, his widow, who, on the 19th of February, 1885, obtained payment of a sum of 100*l.* on a policy upon his life, insured in the Northern Assurance Company.

Subsequently a will and codicil of the deceased's were discovered appointing the plaintiff executrix, who thereupon issued a writ in an action propounding the will and codicil, and an administrator pending suit was appointed by the Court, and an order made that Susan Smart, the defendant, do pay to the administrator the 100*l.* received from the assurance society. This order had been duly served and not obeyed, and notice of motion having been given to the defendant,

Barnard, for the plaintiff, moved for an attachment for non-obedience of the order: *Harvey* v. *Hall* (1); *Middleton* v. *Chichester* (2); *Browning* v. *Sabin*. (3) If this is not a debt the Debtors Act, 1869 (32 & 33 Vict. c. 62, s. 4), does not apply, and if the section does refer to a case like the present, it is within the exceptions of sub-s. 3. (4) This Court is now a Court of Equity.

(1) Law Rep. 11 Eq. 31.
(2) Law Rep. 6 Ch. 152.
(3) 5 Ch. D. 511.
(4) The following are the material parts of the section referred to:
"With the exceptions hereinafter

Stevenson Moore, for the defendant. The proper course would be to sue upon the administration bond: *Sarah Ann Cooper, deceased.* (1)

BUTT, J. I am of opinion that the defendant is not protected by the Debtors Act of 1869, and though I am unwilling to send her to prison, I have no alternative. Attachment granted with costs, but not to be issued from the registry for ten days.

Solicitors for plaintiff: *Blair & W. B. Girling.*
Solicitors for defendant: *Want & Harston.*

R. A. P.

GYTE *v.* GYTE AND MULLINEAUX. *June 9.*

Damages—Payment into Court—Proceedings under the Debtors Act.

The Court having ordered damages to be paid into the registry, and proceedings in default being impracticable, as there was no one to institute them, the Court ordered the damages to be paid to the petitioner, he undertaking to pay them into Court.

THIS was a petition for dissolution of marriage in which a jury had awarded 500*l.* damages. The Court had ordered the damages to be paid into the registry within four days, and this order not having been complied with,

Searle, for the petitioner, moved for an attachment.

Bayford, for the co-respondent. This is a default in payment of a sum of money within the meaning of s. 4 of the Debtors Act, 1869, and must, therefore, be dealt with by proceedings under that Act.

Searle, in reply. The order being to pay money into Court there is no one to institute the proceedings in the Bankruptcy Court under the Debtors Act.

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mentioned, no person shall . . . be arrested or imprisoned for making default in payment of a sum of money.

"There shall be excepted from the operation of the above enactment

. . . . . .

"3. Default by a trustee or person acting in a fiduciary capacity, and ordered to pay by a Court of Equity any sum in his possession or under his control." Debtors Act, 1869, s. 4.

(1) 6 P. D. 34.

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GYTE v. GYTE.

SIR J. HANNEN (President). Let the damages be paid to the petitioner, he undertaking to pay them into Court when received.

Order accordingly.

Solicitors for petitioner: *Ridsdale & Son.*
Solicitors for co-respondent: *Chester & Co.*

R. A. P.

Jan. 20.

CHICHESTER *v.* CHICHESTER.

Restitution of Conjugal Rights—Service of Petition—Jurisdiction.

The Court has no power to allow service abroad of a petition for restitution of conjugal rights.

THIS was a petition for restitution of conjugal rights by the husband against the wife.

The petition, which alleged a marriage in Ireland, cohabitation in England and on the continent of Europe, and refusal to cohabit, was served on the respondent at the Grand Hotel, Bismarck Plat, Dresden. The respondent appeared under protest, and a summons was issued on her behalf to set aside the service of the citation and copy petition as having been effected out of the jurisdiction.

Powles, for the respondent, cited *Firebrace* v. *Firebrace*. (1)

Bayford, for the petitioner. The respondent by appearing at all has waived her right to object.

SIR J. HANNEN (President) granted the application.

Solicitors for petitioner: *Halse, Trustram, & Co.*
Solicitors for respondent: *Duncan, Warren, & Gardner.*

(1) 4 P. D. 63.

R. A. P.

ALLEN *v.* ALLEN. 1885

Sequestration—Previous Writ of Attachment—Personal Service. *June* 30.

The respondent in a suit for restitution of conjugal rights was evading service of the decree, and an order as to custody of children. The Court, though she was not abroad, ordered a writ of sequestration to issue, without a previous writ of attachment or personal service of the decree or order.

THIS was a suit for restitution of conjugal rights, in which the husband had obtained a decree, and subsequently an order also, to deliver up to him the children of the marriage. Both had been disobeyed. Affidavits were filed to the effect that the orders had been served at the respondent's residence upon a person who took them in, and after a short interval returned and said there was no answer. Letters also had been sent addressed to the same place, but had not been returned.

A. J. M. McIntyre, for the petitioner, moved for a writ of sequestration. It is clear that the respondent is evading personal service, and the Court will therefore dispense with it. It is not now necessary that an attachment should issue prior to sequestration: *Miller* v. *Miller.* (1)

Middleton, for the respondent. According to the practice of the Court of Chancery personal service is indispensable: Daniel's Chancery Practice (5th ed.), 903. In *Miller* v. *Miller* (1) the person to be served had gone abroad.

SIR J. HANNEN (President). I am satisfied that these orders have come to the knowledge of the respondent, and that she is keeping out of the way in order to avoid personal service. The principle of *Miller* v. *Miller* (1) applies to this case, and therefore I order the writ to issue, and condemn the respondent in costs.

Solicitor for petitioner: *Antill.*

Solicitors for respondent: *Griffinhoofe & Co.*

(1) Law Rep. 2 P. & D. 54.

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Feb. 13.

[IN THE COURT OF APPEAL.]

CLARK *v.* CLARK.

Separation Deed—Agreement by Wife not to sue for Restitution of Conjugal Rights.

By a deed of separation between the husband, the wife, and a trustee, containing a recital that the husband and wife had agreed to live separate, the husband covenanted with the trustee to pay the wife 25*l.* a year till their only child should attain twenty-one, or die under that age or become chargeable to the husband, and to allow her to enjoy all her present and future property for her separate use, and the trustee covenanted with the husband to indemnify him against the debts of the wife, and that the wife should not take any proceedings to compel him to live with her. The annuity was paid until the child died, a minor. The wife after this presented her petition for the restitution of conjugal rights, and the husband pleaded the separation deed. Butt, J., dismissed the petition :—

Held, that an agreement entered into by a wife for valuable consideration, and without fraud or duress, that she will not take proceedings to compel her husband to return to cohabitation, is a bar to such proceedings :

Held, also, that the recital of the agreement to live separate, being contained in a deed to which the wife was a party, was evidence of a contract by her to allow her husband to live separate from her, and that after accepting benefits under the deed, she could not be heard to say that she had not contracted, because the covenant not to sue was entered into only by the trustee and not by her.

Marshall v. *Marshall* (5 P. D. 19) approved.

Mr. and Mrs. Clark were married on the 9th of February, 1868, and on the 8th of January, 1869, a child was born. On the 28th of March, 1870, a deed between the husband of the first part, the wife of the second part, and D. W. Thompson of the third part, was executed by all parties. It recited that "unhappy differences have arisen between the said T. Clark and M. A. Clark, and they have consequently agreed to live separate from each other for the future, and the said T. Clark hath agreed, subject to the provisions hereinafter contained, to allow and pay the said M. A. Clark one annuity or clear yearly sum of 25*l.*, as and for her separate maintenance and support, and for the maintenance and support of their infant child Sophia M. M. Clark, such annuity to cease and be discontinued when and so soon as the said S. M. M. Clark shall attain the age of twenty-one years, or on

her dying before attaining such age, and to enter into the covenants hereinafter contained." The husband then, in consideration of the covenant by Thompson thereinafter contained, covenanted with Thompson to pay the wife 25*l.* a year till the child should attain twenty-one, or die under that age or become chargeable to the husband: and that the wife might at all times thereafter live separate from the husband, and that he would not at any time thereafter require or by any means compel her to live with him, or institute any legal proceedings or take any other steps whatsoever for that purpose, or molest or interfere with her, and that she should be at liberty to take away, hold and enjoy, for her own separate and absolute use and benefit, all household furniture, plate, linen, china, glass, and other articles of a like nature which belonged to her before her marriage with Clark: and that all real and personal property (if any), including savings of the annuity of 25*l.*, to which she then was, or to which she or Clark in her right should become seised, possessed, or entitled during their joint lives, should be held by her for her separate use and disposed of accordingly, as if Clark were dead, and that if she died intestate as to any such personal property it should go to the persons who under the Statutes of Distribution would have been entitled thereto if she had died possessed thereof having survived Clark, and that Clark would, at the expense of the persons requiring the same, execute and do all deeds and things for carrying into effect the provisions of the deed as Thompson, his executors or administrators, should reasonably require. It was then further witnessed that in further pursuance of the agreement and in consideration of the premises Thompson covenanted with Clark that he Thompson, his heirs, executors, and administrators would at all times during the continuance of the separation, and so long as Clark should pay the yearly sum of 25*l.*, keep Clark, his heirs, executors and administrators, indemnified against all debts and liabilities of the wife, "and further that the said M. A. Clark or any person on her behalf shall not nor will at any time hereafter commence or prosecute any suit or other proceeding for compelling the said T. Clark to cohabit or live with her the said M. A. Clark." There was a proviso authorizing Clark to deduct from the annuity of 25*l.*, without

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prejudice as to his remedy against Thompson, any debts of the wife which he might be called on to pay, and a proviso determining the provision for the wife if the parties returned to cohabitation, or if Clark was called upon or compelled to make any further provision for the wife, or was adjudicated a bankrupt.

The 25*l.* a year was duly paid until the 14th of October, 1873, when the child died, after which the husband made no further payment for the benefit of the wife.

On the 6th of February, 1883, Mrs. Clark presented her petition for the restitution of conjugal rights. The husband by his answer set out the separation deed, and relied on it as a defence to the petition. The petitioner by her reply alleged that there was no consideration for the deed of separation, and that the deed was procured by fraud and undue pressure of the respondent, and that the petitioner was unaware of its contents, and signed it through fear and under threats of the respondent.

Butt, J., held that the deed was a bar to the wife's proceeding, and dismissed her petition. The wife appealed.

Feb. 13. *Keogh*, for the appellant. The evidence shews that the deed was obtained under such circumstances that it ought to be set aside, and therefore ought not to be taken as a bar to this proceeding. It is true that *Wilson* v. *Wilson* (1) shews that an agreement for separation does not make a deed illegal; but whether the Court will enforce it is quite another question. The observations of Lord Selborne in *Cahill* v. *Cahill* (2) have an important bearing on the authority of *Hunt* v. *Hunt* (3), which, as he there says, is the only case where a covenant not to sue for restitution of conjugal rights has been enforced.

[*Lyon*, for the respondent, referred to *Marshall* v. *Marshall* (4) as in point.]

It is not necessary to impeach that case, but it does not govern the present, for the circumstances under which the petitioner was induced to execute the deed make it not binding upon her.

Tatlock, with him, desired to dispute the authority of *Marshall* v. *Marshall*. (4)

(1) 1 H. L. C. 538.
(2) 8 App. Cas. 420, 421.
(3) 4 D. F. & J. 221.
(4) 5 P. D. 19.

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BAGGALLAY, L.J. The view of the Court is that *Marshall* v. *Marshall* (1) is on all fours with the present case. The leading counsel for the appellant does not seek to impugn it, his junior wishes to argue that it was wrongly decided. Sitting, as we do, in a Court of Appeal, I think we ought to listen to Mr. Tatlock's argument, though it is very inconvenient that the leader and junior should take inconsistent lines.

BOWEN and FRY, L.JJ., concurred.

Tatlock, for the appellant. There is no authority in the books to shew that such a covenant as this will be enforced against the wife. Trustees were introduced into separation deeds in order to get over the difficulty that a married woman could not contract, so they covenanted with the husband, giving him a remedy in damages.

[FRY, L.J. Courts of Equity have held that in cases of this kind husband and wife can contract with each other: *Vansittart* v. *Vansittart*. (2)]

Lord Eldon, in *Westmeath* v. *Westmeath* (3), held that they could not. Moreover, there is no covenant by the wife, but only by the trustee. The wife has not contracted not to sue.

[*Inderwick, Q.C.*, referred to *Besant* v. *Wood* (4), in which case the covenant was by the trustees only, and was enforced against the wife.]

The point that the covenant was only by the trustee was not discussed there.

[FRY, L.J. The husband and wife being capable of contracting, is not the recital that they have agreed to live separate an agreement to do so?

BOWEN, L.J. The observations of Jessel, M.R., in *Besant* v. *Wood* (5) are in favour of enforcing such stipulations.]

The observations of Lord Selborne in *Cahill* v. *Cahill* (6) on *Besant* v. *Wood* (4), shew that the remarks of Jessel, M.R., are to be taken in a restricted sense.

Inderwick, Q.C., and *Lyon, contrà*, were not called upon.

(1) 5 P. D. 19.
(2) 4 K. & J. 62.
(3) Jac. 126.
(4) 12 Ch. D. 605.
(5) 12 Ch. D. 605, 620, 621.
(6) 8 App. Cas. 420

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BAGGALLAY, L.J. This case comes before us under singular circumstances. A lady has presented a petition for restitution of conjugal rights, to which the husband has pleaded a deed of separation. The parties were married in 1868, and there was one child of the marriage. In 1870 a deed was executed between the husband of the first part, the wife of the second part, and a trustee of the third part, which recited that unhappy differences had arisen between the husband and wife, and they had consequently agreed to live separate and apart from each other, and the husband had agreed to allow to the wife the annuity therein mentioned, and to enter into the covenants thereinafter contained. If the husband and the trustee had been the only parties to this deed, I do not say what my opinion would have been. But the wife is a party to it, and therefore a party to this recital. The husband goes on to covenant with the trustee to pay 25*l.* a year to the wife during the period therein mentioned, and to allow her to live separate, and that she should be at liberty to enjoy all her property, present and future, for her separate use. The trustee then covenants with the husband that he will, while the husband pays the 25*l.*, keep the husband indemnified against the wife's debts, and that the wife shall not take any proceedings to compel the husband to live with her. The wife is not a party to either of the covenants, but she is a party to the deed, and so recognises its recitals. The husband set up this deed as a defence to the petition; the wife replied that there was no consideration for the deed, and that it was obtained by fraud. The judge held these objections void. Mr. Keogh founded his case on these objections, but I entirely agree with the judge that they cannot be supported on the evidence.

Mr. Tatlock raised a further point, and contended that, assuming the deed not to be impeachable on those grounds, still it is no defence to the petition. *Marshall* v. *Marshall* (1), which was referred to on this head, is directly in point, for in that case the wife was held bound by a covenant not to sue for restitution of conjugal rights. Sir James Hannen, who went fully into the case, there says (2), "There has been considerable fluctuation of opinion as to the extent to which voluntary engagements of married persons to

(1) 5 P. D. 19. (2) Page 23.

live separate should be recognised by the Courts of law. But since the decision of the House of Lords in *Wilson* v. *Wilson* (1) it can no longer be contended that there is anything illegal or contrary to public policy in an agreement between married persons that no suit for restitution of conjugal rights shall be instituted by either of them. For my own part I must say that the opinion I have formed after several years' experience in the administration of the law in this Court is, that it is in the highest degree desirable for the preservation of the peace and reputation of families that such agreements should be encouraged, rather than that the parties should be forced to expose their matrimonial differences in a Court of justice. And I must further observe that so far are suits for restitution of conjugal rights from being in truth and fact what theoretically they purport to be, proceedings for the purpose of insisting on the fulfilment of the obligations of married persons to live together, I have never known an instance in which it has appeared that the suit was instituted for any other purpose than to enforce a money demand." It is true that the precise point was not decided in *Wilson* v. *Wilson* (1), but that case laid down the principle that there is nothing contrary to public policy in such agreements. Soon after the decision in *Marshall* v. *Marshall* (2) the case of *Besant* v. *Wood* (3) came before the late Master of the Rolls, who says: (4) "It seems to me to follow as a necessary corollary to the right to sue by herself, that she must have the right to contract not to sue, and I should think that there would be no difficulty at all about it. At the same time I confess there are to be found numerous dicta the other way, though there are some my way, as to what the law is. I think that the law is, therefore, that a woman can contract to live separate and apart from her husband. . . . The case which really decided that these contracts to live separate and apart from each other were not against the policy of the law, is the well known case of *Wilson* v. *Wilson*. (1) The form of the appeal in that case was relating to the execution of the deed of separation, and not to enforcing the separation itself. But of course if the deed when executed had been against public policy, no order could have been made, or

(1) 1 H. L. C. 538.
(2) 8 App. Cas. 420.
(3) 12 Ch. D. 605.
(4) Page 622.

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ought to have been made; but the House of Lords decided in that case that there was nothing against public policy in the deed of separation itself, and I think it must be considered to be established by that case that any notion of such deeds being against public policy was finally dispelled or got rid of. No judgment in that case was given on the question as to whether the Court would enforce by injunction a stipulation to live separate. The point came on afterwards in the case of *Hunt* v. *Hunt* (1). There the Master of the Rolls refused to grant an injunction, and, amongst other grounds, the injunction was refused upon the ground that there was no mutuality of agreement. It was appealed to Lord Westbury, who gives a clear expression of opinion that the ordinary power of contracting, of course on both sides, ought to be enforced in the ordinary way. He afterwards gave a final judgment, from which I think that his opinion was that you might sue the wife, and that you might claim and obtain an injunction against her. Here, again, I support my conclusion by the case of *Marshall* v. *Marshall* (2) before the President of the Probate Division. There is a clear expression of opinion by Sir James Hannen coming to the same conclusion as that at which I have arrived, that Lord Westbury's opinion was in favour of the power of the Court to prevent the wife, in a suit instituted against her by the husband, from instituting a suit for the restitution of conjugal rights."

Ever since the decision in *Wilson* v. *Wilson* (3) there has been a strong bearing in the direction of giving effect to deeds of this kind, and I am of opinion that Butt, J., came to a correct conclusion, and that this appeal must be dismissed.

BOWEN, L.J. I am of the same opinion. This is a suit by a wife for the restitution of conjugal rights, and the husband sets up in bar a deed of separation. Since the Judicature Acts it is clear that a contract which would have given a right to an injunction to restrain a suit may be set up as a defence in the suit, and must be examined on the same principles as it would formerly have been examined in a Court of Equity. If this is a

(1) 4 D. F. & J. 221. (2) 5 P. D. 19.
(3) 1 H. L. C. 538.

deed of such a nature that a Court of Equity can recognise it as valid there is no ground on which the Court can impeach it, there being no evidence of duress, undue influence, or fraud. The question, therefore, merely is whether a contract of this kind can be enforced against a wife. It was settled by *Wilson* v. *Wilson* (1) that such a contract is not against the policy of the law. But, assuming that to be so, can it be enforced against the wife, whose coverture, it is urged, prevents her from binding herself? There are several cases bearing on the question. In *Hunt* v. *Hunt* (2) Lord Westbury expressed a decided opinion in the affirmative, though as the husband was in that case the defendant the point did not call for decision. In *Marshall* v. *Marshall* (3) the precise point was decided. The question came again before Sir G. Jessel in *Besant* v. *Wood* (4), and an injunction was granted against the wife. The Master of the Rolls went through the history of the doctrine, and gives strong reasons why such a contract should be held enforceable against a married woman. I think that his reasoning cannot be shaken, that where a wife has power to sue her husband she must have power to compromise any such proceeding, or to bind herself to abstain from taking it. There is nothing in *Cahill* v. *Cahill* (5) to destroy the authority of *Besant* v. *Wood*. (4) So far as the decision in that case goes, there is only a warning against carrying the principle further. Until the House of Lords declares the law to be otherwise, we must proceed on the view that a contract by a married woman not to sue for restitution of conjugal rights can be enforced against her.

Is there, then, such a contract in the present case? It has been the subject of much observation that there is no covenant by the wife, but only by the trustee. But the deed, to which the wife is a party, recites an agreement between the husband and wife to live separate, and a recital may bind if intended to be evidence of a contract. It is not necessary that an agreement should be in any particular form; all that is required is that there should be evidence of a contract into which the wife entered with her eyes open and for valuable consideration. Here it is plain

(1) 1 H. L. C. 538.
(2) 4 D. F. & J. 221.
(3) 5 P. D. 19.
(4) 12 Ch. D. 605.
(5) 8 App. Cas. 420.

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Bowen, L.J.

that there was a contract so entered into. A woman who executes a deed containing this recital and accepts money on the faith of it cannot be heard to say, that there was no agreement by her, because the covenant that she should not sue was entered into by her trustee and not by herself.

FRY, L.J. I agree both in the conclusion and the reasons of my learned Brethren.

Appeal dismissed.

Solicitor for appellant: *F. G. Cordwell.*
Solicitors for respondent: *E. Doyle & Sons.*

H. C. J.

June 2.

IN THE GOODS OF GENERAL WILLIAM EARLE, DECEASED.

Administration Bond—Sureties—Amount.

The Court will not by reason of the property being large and the risk small dispense with sureties to an administration bond or lessen the amount to be secured. But it will allow the security to be made up of any number of bonds.

MAJOR-GENERAL WILLIAM EARLE, C.S.I., C.B., died in the Soudan on the 10th of February, 1885, having made his will dated the 17th of April, 1869, and thereby bequeathed the whole of his property, amounting to about 100,000*l.*, to his wife, but having appointed no executor. His widow had applied for letters of administration with the will annexed.

Searle, for the widow, asked that sureties might be required for only a nominal sum, or only to the amount of the debts. The debts do not exceed 180*l.*, and all the rest of the property will belong to the widow, but according to the practice she is required to find sureties to the extent of 200,000*l.*: *In the Goods of Gent* (1); *In the Goods of De la Farque.* (2)

SIR J. HANNEN (President). I do not understand why there is a greater difficulty in this case than in so many other cases that occur every year. The amount of the bond is not the measure

(1) 1 Sw. & Tr. 54: 27 L. J. (P. & M.) 37.

(2) 2 Sw. & Tr. 631; 31 L. J. (P. & M.) 199.

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of the liability, as the sureties are only answerable for the due administration of the funds intrusted to the administrator. The slighter the risk the less it would seem would be the difficulty of obtaining security. I see no reason, therefore, why the Court should take upon itself the responsibility of dispensing with security and altering the ordinary practice of the Court. The security may, however, be limited to 150,000*l.*, and may be made up of any number of bonds.

Solicitors: *Young, Jackson, & Beard.*

R. A. P.

IN THE GOODS OF ELIZABETH McGOWAN, DECEASED.

June 9.

ELIZABETH McGOWAN, deceased (wife of Dr. Alexander Norbourn McGowan), by virtue of certain powers, made her will dated the 6th of October, 1862, and thereby bequeathed her personal estate in trust for her husband for life, and after his death for the benefit of all the children of the marriage, and appointed her husband and Robert Story Cannan executors and trustees. Robert Story Cannan renounced the duties of executor and trustee, and Dr. McGowan had become lunatic, and administration of the estate of the deceased had been granted to James Murray, limited to the husband's lunacy or until one of the children attained twenty-one.

William Smart McGowan, one of the sons, became of age on the 1st of April, 1885, and applied at the registry for a grant of administration with the will annexed. The estate now consisted of the following, viz.:—

21,424*l.* Consols, standing to the credit of an administration action in the Chancery Division.

6000*l.* secured by mortgage of freehold property.

80 shares in the Gloucester Tramways Company, Limited, fully paid up.

50 preference shares in the York Tramways Company, Limited, fully paid up.

Gray, moved that sureties might be dispensed with, or that

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their liability should be limited to double the value of the tramway shares. The consols are already in court in the action in the Chancery Division, and the administrator can only deal with them and the money on mortgage as that Court may direct.

SIR J. HANNEN (President). If all the property except the shares is in safe custody, the burden to be borne by the sureties will be slight, and there will be but little difficulty in obtaining them, and if the risk is not slight there is the greater reason for the Court declining to dispense with them. Applications of this kind are constantly made, but I have always discouraged them. Indeed, it is found in practice that there is no difficulty in getting security, but were it otherwise I decline to take upon myself the burden of deciding whether or no the risk is insignificant.

Application refused.

Solicitors: *Cunliffes & Davenport.*

R. A. P.

Jan. 27.

IN THE GOODS OF JANE JOYCE HALLIWELL, DECEASED.

Administration—Amount of Bond.

An estate having been partly administered and a further bond become necessary, the Court allowed the administrator to take the grant for the amount then due to the estate, and to give security only for double that amount.

JANE JOYCE HALLIWELL died on the 31st of October, 1875, intestate, leaving several children all then under age.

On the 8th of December, 1875, letters of administration durante minoritate were granted to William Harland Hebb (as guardian) for the benefit of the infants. The value of the estate was then sworn by him under 4000*l.*, the exact amount being 3446*l.* 11*s.* 2*d.* On the 17th of June, 1881, the eldest child, Gertrude Lena Halliwell, attained the age of twenty-one years, but was then in New Zealand, and William Harland Hebb continued to administer the estate until the month of July, 1883, when he absconded, having rendered no accounts and misapplied the moneys he had received. In 1883 an action had been commenced in the Chancery Division for administration of the deceased's personal estate, and

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the grant to Hebb having expired, another grant became necessary for the purposes of that action. On the 10th of December, 1883, the deceased's second daughter, Beatrice Amy Halliwell (who had then attained the age of twenty-one years), while on a visit to this country from New Zealand executed a power of attorney to William Henry Rowland to enable him to obtain administration.

At the registry Mr. Rowland had been required to swear the estate at the sum at which it was originally sworn by Hebb, viz., 3446*l.* 11*s.* 2*d.*, and to enter into a bond with sureties for double that amount.

Searle, for the applicant. He is not bound to swear the estate at more than its present value, viz. £1267 6*s.* 5*d.*, nor to enter into a bond for more than double that amount. If the registrar's objection is well founded Mr. Rowland might hereafter be called upon to refund the amount misapplied by Hebb, and the Court should give special directions as to the form in which the letters of administration are to issue, so as to protect him from that event: *In the Goods of Fozard.* (1)

SIR J. HANNEN (President). There is no objection in principle or practice to the course Mr. Rowland proposes to take. The value of the estate must be sworn at the reduced amount, and Mr. Rowland should enter into a bond for double that sum only. I decline to give any special directions as to the form of the letters of administration, as it is unnecessary; but he may apply to the Court again if any difficulty should arise upon that matter.

Solicitors for applicant: *Peacock & Goddard.*

(1) 3 Sw. & Tr. 173.

R. A. P.

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JUDICIAL SEPARATION—*Jurisdiction of Magistrates—Aggravated Assault—Matrimonial Causes Act*, 1878—24 & 25 *Vict. c.* 100, *s.* 43.] If a husband has been convicted of an aggravated assault the magistrates may grant a judicial separation, even though they do not fine or imprison him. Woods *v.* Woods - - - - 172

JUSTICES—Jurisdiction to grant judicial separation—Aggravated assault - - 172
See Judicial Separation.

NEW TRIAL—Application for—Time for appealing - - - - - 110
See Practice.

NULLITY—*Impotence—Delay—Sincerity.*] At the end of seven years' cohabitation a marriage had not been consummated through the impotence of the alleged husband. The alleged wife subsequently cohabited with another man, and upon the alleged husband discovering her misconduct she instituted a suit for nullity of marriage against him and he a suit for dissolution of marriage against her:—*Held*, that the proof of impotence being clear her conduct did not shew such a want of sincerity as to deprive her of her right to have the marriage annulled.—When the impotence is undoubted mere delay is not sufficient to disentitle the injured party to relief. M. otherwise D. *v.* D. - - - - - 75

2. —— *Insanity.*] The burden of shewing that the respondent was insane at the time of the marriage lies upon the party asserting it, and the Court has to determine whether the respondent was capable of understanding the nature of the contract, and the duties and responsibilities which it creates, and was free from the influence of morbid delusions upon the subject. Durham *v.* Durham. Hunter *v.* Edney, otherwise Hunter. Cannon *v.* Smalley, otherwise Cannon - 80

—— Impotence—Cross suit for divorce by reason of adultery—Cross-examination - 175
See Practice. 7.

PRACTICE—*Application for New Trial—Time for appealing—23 & 24 Vict. c.* 144, *s.* 2; 36 & 37 *Vict. c.* 66, *s.* 16; 38 & 39 *Vict. c.* 77. *s.* 18; 44 & 45 *Vict. c.* 68, *s.* 9.] An appeal from a decision of a judge of the Probate Division granting or refusing a new trial in the Divorce Court must be made within fourteen days in accordance with the Divorce Court Act, 1860 (23 & 24 Vict. c. 144), s. 2. Ahier *v.* Ahier - - - C. A. 110

2. —— *Attachment—Wife's Costs—Security—Debtors Act*, 1869.] Notwithstanding the provisions of the Debtors Act, 1869, a husband is liable to attachment if he does not find security for his wife's costs of suit. Lynch *v.* Lynch - 183

3. —— *Contempt—Attachment—Payment of Costs.*] A respondent being in contempt for non-obedience of an order for restitution of conjugal rights, the petitioner applied for a writ of attachment against him:—*Held*, that since the passing of the Matrimonial Causes Act, 1884, the writ could not be issued notwithstanding that the contempt existed prior to that Act:—*Held*, also, that the writ could not issue for non-payment of costs. Application refused. Weldon *v.* Weldon 72

4. —— *Damages—Payment into Court—Proceedings under the Debtors Act.*] The Court having ordered damages to be paid into the registry, and proceedings in default being impracticable, as there was no one to institute them, the Court ordered the damages to be paid to the petitioner, he undertaking to pay them into Court. Gyte *v.* Gyte - - - - - 185

5. —— *Dissolution of Marriage—Variation of Settlements—Costs of Suit.*] A marriage had been dissolved at the suit of the husband. By

PRACTICE—*continued.*

the marriage settlements the wife had certain interests in her husband's property, and had also power to appoint a portion of her own property for the benefit of any husband she might marry after the death of her late husband, and for the children of that marriage.—She and her husband had at present about 400*l.* a year each, but she was entitled to reversionary property of great value, and was liable to pay the costs of the suit.—The Court gave half of the wife's present and reversionary income to the husband for himself and the two children of the marriage, and—*Held*, that her interest in her husband's property must be extinguished, and that her powers of appointment in favour of a future husband and children must not take effect until after the death of her late husband:—*Held*, also, that in varying the settlements the Court must not take into consideration in her favour that she has to pay the costs of the suit. Noel *v.* Noel - - - - - 179

6. —— *Divorce—Interrogatories to Party to Suit—Nullity of Marriage—Jurisdiction of Divorce Division—Supreme Court of Judicature Act*, 1873 (36 & 37 *Vict. c.* 66), *ss.* 16, 23—*Interrogatories necessarily criminating—Felony.*] In a suit for nullity of marriage, the Court has power to give leave to administer interrogatories between the parties to the suit; for suits of that kind were formerly within the jurisdiction of the Ecclesiastical Courts, which had power to allow interrogatories to be administered between the parties, and now all the jurisdiction of the Ecclesiastical Courts as to suits for nullity of marriage (including matters of practice and procedure) is vested in the Probate, Divorce, and Admiralty Division. And, further, even if the power to allow interrogatories to be administered between the parties did not otherwise exist, it would be conferred upon the Probate, Divorce, and Admiralty Division by the Supreme Court of Judicature Act, 1873; for at the time of passing that statute the Superior Courts of Common Law and the Court of Chancery had power to allow interrogatories to be administered between the parties to a suit; and by s. 16, all the jurisdiction of those Courts, including the ministerial powers and authorities incident thereto, was transferred to and vested in the High Court of Justice, and by s. 23 the jurisdiction transferred to the High Court may (so far as regards procedure and practice) be exercised in the same manner, as it might have been exercised by any of the Courts whose jurisdiction has been transferred.—Leave to administer interrogatories ought not to be refused on the ground, that it is plain from the nature of the case that they must necessarily criminate the party interrogated, who cannot answer them without admitting that he has been guilty of felony: he may, however, decline to answer them.—*Semble*, that inasmuch as proceedings for divorce and for other matrimonial causes are excluded from the operation of the Rules of the Supreme Court, 1883, by Order LXVIII., r. 1 (*d*), an application for leave to administer interrogatories between the parties to a suit ought not to be made to a registrar of the Divorce Division; but it ought to be made in the first instance to one of the judges of the Court. Harvey *v.* Lovekin - - - C. A. 122

PRACTICE—*continued.*

7. —— *Nullity—Impotence, Suits for Nullity of Marriage and Dissoluiion of Marriage—Cross-examination as to Adultery.*] A suit had been instituted for nullity of marriage by reason of impotence, and a cross-suit for dissolution of marriage by reason of adultery:—*Held*, that, in the first suit, the petitioner in that suit might be cross-examined as to her improper intimacy with the co-respondent in the cross-suit. M. *v.* D. [175

8. —— *Nullity of Marriage — Variation of Settlements.*] A marriage having been annulled, the Court ordered all the property of the alleged wife to be reconveyed to her freed from the trusts of the settlement upon the alleged marriage. A. *v.* M. - - - - - - 178

9. —— *Restitution of Conjugal Rights—Service of Petition—Jurisdiction.*] The Court has no power to allow service abroad of a petition for restitution of conjugal rights. Chichester *v.* Chichester - - - - - 186

10. —— *Sequestration — Previous Writ of Attachment—Personal Service.*] The respondent in a suit for restitution of conjugal rights was evading service of the decree, and an order as to custody of children. The Court, though she was not abroad, ordered a writ of sequestration to issue, without a previous writ of attachment or personal service of the decree or order. Allen *v.* Allen [187

PRIVILEGE — Criminating interrogatories—Divorce - - - - 122
See Practice. 6.

RESTITUTION—Conjugal rights—Agreement by wife not to sue for conjugal rights 188
See Separation Deed.

SEPARATION DEED—*Agreement by Wife not to sue for Restitution of Conjugal Rights.*] By a deed of separation between the husband, the wife, and a trustee, containing a recital that the husband and wife had agreed to live separate, the husband covenanted with the trustee to pay the wife 25*l.* a year till their only child should attain twenty-one, or die under that age or become chargeable to the husband, and to allow her to enjoy all her present and future property for her separate use, and the trustee covenanted with the husband to indemnify him against the debts of the wife, and that the wife should not take any proceedings to compel him to live with her. The annuity was paid until the child died, a minor. The wife after this presented her petition for the restitution of conjugal rights, and the husband pleaded the separation deed. Butt, J., dismissed the petition.—*Held*, that an agreement entered into by a wife for valuable consideration, and without fraud or duress, that she will not take proceedings to compel her husband to return to cohabitation, is a bar to such proceedings:—*Held*, also, that the recital of the agreement to live separate, being contained in a deed to which the wife was a party, was evidence of a contract by her to allow her husband to live separate from her, and that after accepting benefits under the deed, she could not

SEPARATION DEED—*continued.*
be heard to say that she had not contracted, because the covenant not to sue was entered into only by the trustee and not by her. *Marshall* v. *Marshall* (5 P. D. 19) approved. Clark *v.* Clark [C. A. 188

SEQUESTRATION—Evasion of service - 187
See Practice. 10.

SERVICE—Out of jurisdiction — Restitution of conjugal rights—Petition - 186
See Practice. 9.

—— Evasion of—Writ of sequestration - 187
See Practice. 10.

SETTLEMENTS, VARIATION OF—Details—Divorce—Costs of suit - - 179
See Practice. 5.

—— Nullity of marriage - - - 178
See Practice. 8.

STATUTES:

23 & 24 Vict. c. 144, s. 2 - - - 110
See Practice.

24 & 25 Vict. c. 100, s. 43 - - - 172
See Judicial Separation.

32 & 33 Vict. c. 62 - - - 183, 185
See Practice. 2, 4.

36 & 37 Vict. c. 66 - - - - 122
See Practice. 6.

36 & 37 Vict. c. 66, s. 16 - - - 110
See Practice.

38 & 39 Vict. c. 77, s. 18 - - - 110
See Practice.

44 & 45 Vict. c. 68, s. 9 - - - 110
See Practice.

ADMIRALTY.

ADMISSION—Master of ship—Evidence - 137
See Practice. 5.

APPEAL—Withdrawal of—Cross appeal—Order LVIII., r. 6 - - - - 18
See Practice.

ARREST—Ship—Defendant's costs—Commission on bail - - - - 158
See Salvage. 3.

AVERAGE BOND—Salvage—Cargo—Duty of shipowner - - - - 114
See Salvage.

BAIL—Action of salvage—Defendant's costs 158
See Salvage. 3.

—— Bottomry—Guarantee—Private agreement
See Practice. 10. [141

BAIL BOND—Form - - - - 15
See Practice. 11.

BILL OF LADING—Exceptions—"Dangers and accidents of the seas" - - 103
See Salvage. 2.

BOTTOMRY—*Necessaries—Foreign Vessel—Maritime Lien*—3 & 4 *Vict. c.* 65, *s.* 6—24 *Vict. c.* 10, *s.* 5—*Bottomry Bond.*] A foreign vessel was in an English port, and the owner, being temporarily in England and in want of funds for the purchase of necessaries, made an agreement with the plaintiffs by which, in consideration of their advancing him by cash or acceptance 600*l.* for necessaries supplied to and for the use of the vessel, he thereby undertook to return them the amount so advanced with interest and all charges on the return of the vessel from her voyage. And the plaintiffs were thereby authorized "to cover the amount advanced the owner by insurance on ship, &c., out and home at owner's cost."—In an action in rem for necessaries in respect of the amount so advanced:—*Held*, by the Court of Appeal (Bowen and Fry, L.JJ., Brett, M.R., doubting), first, that this agreement was not equivalent to a bottomry bond; secondly (by the whole Court) that there

BOTTOMRY—*continued.*
was no lien for necessaries; for that before 3 & 4 Vict. c. 65, s. 6, there was no maritime lien on a foreign ship for necessaries supplied to her, that that section did not give any maritime lien but only a right to seize the ship on the institution of an action, and therefore that the plaintiffs were not entitled to recover against the vessel.—Judgment of Sir J. Hannen (8 P. D. 151) reversed.—*The Ella A. Clark* (Br. & L. 32) overruled. *The Two Ellens* (Law Rep. 4 P. C. 161) explained. The Heinrich Bjorn - - - C. A. 44

CASES—*Ella A. Clark, The* (Br. & L. 32) overruled - - - - - 44
See Bottomry.

—— *Empress Eugenie, The* (Lush. 140), overruled - - - - - 112
See Practice. 4.

—— *Franconia, The* (3 P. D. 164), explained 21
See Practice. 9.

—— *McHenry* v. *Lewis* (22 Ch. D. 397) approved and applied - - - - 141
See Practice. 10.

—— *Thracian, The* (3 A. & E. 504), not followed
See Practice. 13. [1

—— *Two Ellens, The* (Law Rep. 4 P. C. 161) explained - - - - 44
See Bottomry.

CHARTERPARTY—Co-ownership—Liability 69
See Co-ownership.

COLLISION — *Damages — Cargo — Re-shipment—Use of Damaged Cargo.*] Plaintiffs' cargo of coals on board the *K.* was damaged by a collision at C., the port of loading, and had to be unloaded. It was ultimately reshipped and carried on to B., and used by the plaintiffs in smithies, though it was not purchased for this purpose. The shipowner was not willing to ship a fresh cargo except on fresh terms, and the plaintiffs did not ascertain what those terms were. On a reference as to damages, in an action between the owners of

COLLISION—*continued.*

the coal and the owners of the vessel with which the *K.* came into collision, the assistant register decided that the plaintiffs were only entitled to recover the difference between the value of sound and damaged coal at the port of loading, and that if the value was that at the port of destination it must be taken to be the value of smithy coal. On objection to this report:—*Held*, that the shipowner had a right to insist on carrying on the same cargo; that it appearing that he had been willing to take a fresh cargo on fresh terms, it was the duty of the plaintiffs to have ascertained what those terms were, so as to diminish the loss as much as possible, before comparing the loss on the damaged cargo at B., and that from the sale of it at C., and shipping a fresh one:—*Held*, also, that the coal having been used for a particular purpose, was not a reason for estimating its value at that of coal ordinarily used for such purpose. The Blenheim - - - - 167

2. —— *Sailing Rules—Fog—Regulations for Preventing Collisions at Sea—Arts.* 13, 18.] A steamship the *D.* in a dense fog off Ushant proceeding at slow speed heard a whistle about three points on her starboard bow, the whistle was repeated several times and answered by the *D.* In about a quarter of an hour from the first sound of the whistle the steamship *E.* appeared about a length from the *D.* crossing from starboard to port. The engines of the *D.* were reversed full speed but a collision occurred. Butt, J., having held both ships to blame, the owners of the *D.* appealed:—*Held*, by the Court of Appeal (affirming the decision of Butt, J.), that the *D.* was also to blame, for she should have been brought to as complete a standstill as possible, without getting out of command, at an early period after the first sound of the whistle, and should have also stopped and reversed sooner.—Per Brett, M.R.: Under art. 13 (1) "a moderate speed"—in a river or narrow channel—means that a vessel shall be brought nearly to a standstill, whether the whistle or fog-horn of another vessel is heard or not, but in the open sea the article need not be so strictly construed, unless a whistle or fog-horn is heard.—Under art. 18 (2) as soon as it is perceived by those on a steamer in a dense fog that a vessel is coming substantially nearer, the steamer should stop and reverse.—*Semble*, though art. 18 does not apply to a sailing ship, yet she ought in similar circumstances to take off sail so as to come to as complete a standstill as possible, without getting out of command. The Dordogne - C. A. 6

3. —— *Humber Rules—Stern Light—Compulsory Pilotage*—25 & 26 *Vict. c.* 63, *s.* 32—36 & 37 *Vict. c.* 85, *s.* 17.] The *R.* in charge of a tug was dropping stern foremost up the Humber with the tide, and was eventually brought athwart the tide to go into dock. The *R.* was exhibiting, in addition to the mast head and side lights, a white light from the main peak shewing astern, which had been placed there by order of the pilot who was by compulsion of law in charge of the *R.* The Rules for the Navigation of the River Humber, made by Order in Council in pursuance of 25 & 26 Vict. c. 63, s. 32, incorporate the Regulations for Preventing Collisions at Sea. The *E.* coming down the Humber and the *R.* came into collision. At the hearing it was admitted that the *E.* was to blame:—*Held*, that the *R.* was also to blame, for that as the Humber Rules were within the purview of 36 & 37 Vict. c. 85, s. 17, there had been, by the exhibition of a stern light, a breach of a statutory regulation, namely, of art. 2, which it was impossible to say might not have contributed to the collision, and there was no circumstance to make a departure from the regulation necessary:—*Held*, also, that the light having been exhibited by order of the pilot, did not exempt the owner of the *R.* from liability, as the master should not have permitted an infringement of the regulations. The Ripon - 65

4. —— *Liability—Evidence of Negligence—Steam-steering Gear.*] A steamship fitted with a patent steam-steering gear ran into a vessel at anchor in the Thames, owing to the steering gear suddenly not acting; every effort was unavailingly made to avoid the collision. A few days before, on the previous voyage of the same steamship, the same apparatus had similarly refused to act, but no cause for it so doing could be seen on examination. Large numbers of the gears were in use on steamers. In an action of damage:—*Held*, first, that the defendants were not liable for damage caused by the use of this apparatus without negligence. Secondly, that the use of this apparatus on the Thames after it had acted wrongly on a previous occasion, was evidence of negligence, and that the defendants were liable for the damage caused thereby. The European - - 99

5. —— *Sailing Rules—Probability of Risk—Regulations for Preventing Collisions at Sea, Art.* 18.] The *S.* and the *C.* were approaching each other at night on opposite courses, so as to pass starboard to starboard. The master of the *C.* saw the green and white lights of the *S.*, somewhat more than a quarter of a mile distant, coming into line. This indicated a probability that the *S.* was porting, which would cause a risk of collision; soon after the red light of the *S.* was seen. The engines of the *C.* had been previously stopped, but the master did not reverse her engines till the red light of the *S.* was seen; the vessels soon after came into collision:—*Held*, that the *C.* was to blame for infringing art. 18 of the Regulations for Preventing Collisions at Sea, because as there was a probability of risk of collision when the master of the *C.* saw the green and white lights of the *S.* coming into line, he should, being aware of such probability, have then reversed the engines of the *C.* The Stanmore - - C. A. 134

6. —— *Sailing Rules—Regulations for Preventing Collisions at Sea, arts.* 2 *and* 11.] A ship shewed a flare-up light to a steamer approaching on her starboard side:—*Held*, not an infringement of arts. 2 and 11, as such light was not calculated in the circumstances to mislead the approaching vessel. The Merchant Prince - - 139

—— Inspection of lights—Trinity Masters 40
See Practice. 8.

CONTEMPT—Notice of warrant—Removal of ship - - - - - 120
See Practice. 14.

CO-OWNERSHIP—*Charter—Managing Owner—Commission.*] A vessel was chartered for twelve

CO-OWNERSHIP—*continued.*
months, and during the currency of the charter the charterers made default in certain payments and the charter lapsed. The vessel was rechartered by a voyage charter from K. to England. During the performance of this voyage the defendant purchased a share in this vessel:—*Held*, on objection to the registrar's report in a co-ownership action, that the defendant was not liable to bear any of the losses occasioned by the time charter:—*Held*, also, that a part owner being the manager of a ship, is entitled to remuneration for his services, but that there is no fixed rate applicable. The Meredith - - - 69

—— Action of restraint—Form of bail bond 15
See Practice. 11.

—— Order for sale—Admiralty - - 4
See Practice. 3.

COSTS—Action of salvage—Commission on bail
See Salvage. 3. [158

—— Reference—Discretion of Court - 112
See Practice. 4.

—— Salvage—Tender after action - - 1
See Practice. 13.

COUNTER-CLAIM — Collision — Security for damages—Foreign government - 33
See Practice. 7.

DAMAGE—*Harbour Master—Harbour Commissioners—Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *ss.* 51, 52, 53—*Falmouth Harbour By-laws.*] The *R.*, which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour master, directed the master of the *R.* where to beach her. Before the *R.* left the outer harbour, S. came on board, although a Trinity House pilot was in the vessel, and when she had arrived near the place where she was to be beached gave directions as to the lowering of her anchor. The *R.* overran her anchor and grounded on it, sustaining damage. In an action against the harbour commissioners and S., the Court found as a fact that there was negligence on the part of S., and that the place where the *R.* grounded was outside the jurisdiction of the harbour commissioners:—*Held*, that the duties of the harbour master comprised directions as to the mooring and beaching of vessels; that by giving directions when he went on board, S. had resumed his functions as harbour master, and that he and the commissioners were therefore liable for the damage done to the *R.*—*Held* further, that S. was personally liable as a volunteer. The Rhosina - - - - - 24

2. —— *Harbour Master—Harbour Commissioners—Harbours, Docks, and Piers Clauses Act*, 1847 (10 & 11 *Vict. c.* 27), *s.* 52.] The *R.*, which was anchored in F. outer harbour, having to be beached in the inner harbour, S., the harbour master, directed the master of the *R.* where she was to be beached. Before the *R.* left the outer harbour S. came on board, and when she arrived near the place where she was to be beached, S. gave orders as to the lowering of her anchor. The *R.* overran her anchor and grounded on it, sustaining damage. The *R.* grounded, and the order was given outside the jurisdiction of the harbour commissioners, but the spot where the *R.* was to

DAMAGE—*continued.*
be beached was within their jurisdiction. The Court below found that S. had been negligent in fact:—*Held* by the Court of Appeal, affirming the decision of Sir James Hannen (ante, p. 24), that the commissioners were liable, for under the circumstances the order given by S. was within the scope of his authority as harbour master. The Rhosina - - - - C. A. 131

DAMAGES — Cargo — Reshipment — Use of damaged cargo - - - 167
See Collision.

—— Malicious arrest of ship—Salvage - 158
See Salvage. 3.

ESTOPPEL — *Limitation of Liability—Judgment by Consent—Right of Claim.*] In an action for damages by collision between the owners of the *A.* and the *B.*, the Court, by consent of the parties, made a decree dismissing the action. Subsequently another action was brought by the owners of the cargo on the *A.* against the *B.* in respect of the same collision, and the Court found both vessels to blame. The owners of the *B.* then commenced an action against the owners of cargo on the *A.* for the purpose of limiting their liability in respect of all claims arising out of this collision, and paid the amount of their statutory liability into court. Subsequently, again by consent of the owners of the *A.* and the *B.*, the assistant registrar rescinded the decree by consent in the first action, and the owners of the *A.* then brought in a claim in the limitation action against the fund in court. The registrar held such claim to be inadmissible. On motion to confirm the report:—*Held*, that the report should be confirmed, as the owners of the *A.* and *B.* could not by consent rescind the decree of the Court, and that the decree by consent was a bar to a claim against the fund in court, as it estopped the owners of the *A.* from bringing any further action against the *B.* The Bellcairn - C. A. 161

EVIDENCE—Admission by master of ship—Letter
See Practice. 5. [137

—— Engineer's log—Action of damage - 31
See Practice. 6.

FOG—Collision—Sailing rules—Articles 13, 18
See Collision. 2. [6

FOREIGN GOVERNMENT—Collision—Counter-claim—Security for damages - 33
See Practice. 7.

FOREIGN SHIP — Crew space — Limitation of liability - - - - 21
See Practice. 9.

—— English port—Necessaries—Lien - 44
See Bottomry.

HARBOUR MASTER—Damage to ship—Liability of Harbour Commissioner - 131
See Damage.

—— Mooring and beaching of vessels—Harbour Commissioners—Liability - 24
See Damage.

HIGH BAILIFF—City of London Court—Warrant of arrest—Service—Clerk - 36
See Practice. 2.

INSPECTION — Ship's lights — Trinity masters
See Practice. 8. [40

JUDGMENT — Rescission by consent — Third parties - - - - 161
See Estoppel.

LIMITATION OF LIABILITY—Foreign ship—Crew space - - - - 21
See Practice. 9.
—— Rescission of judgment by consent - 161
See Estoppel.
LOG BOOK — Engineer — Evidence—Action of damage - - - - 31
See Practice. 6.
LONDON—City of London—Warrant of arrest—Service - - - - 36
See Practice. 2.

MASTER —Wages —Wrongful dismissal — Misconduct—Liability of mortgagee 13
See Wages.
MORTGAGOR AND MORTGAGEE — Action by master for wages — Misconduct — Liability of mortgagee - - 13
See Wages.

NECESSARIES—Foreign ship—Admiralty Maritime lien - - - - 44
See Bottomry.
—— Lien—Foreign ship—English port - 44
See Bottomry.
NEGLIGENCE — Unavoidable accident — Steam-steering gear - - - 99
See Collision. 4.
NOTICE — Admiralty—Telegram—Substitute of marshal - - - - 120
See Practice. 14.

PENDING PROCEEDINGS—Stay of action 141
See Practice. 10.

PRACTICE — *Withdrawal of Appeal — Order LVIII., r.* 6.—When a respondent under Order LVIII., rule 6, has given notice that he will on the hearing of an appeal contend that the decision of the Court below should be varied, and the appellant subsequently withdraws his appeal, such notice entitles the respondent to elect whether to continue or withdraw his cross-appeal. If he continues his cross-appeal the appellant has the right to give a cross notice that he will bring forward his original contention on the hearing of the respondent's appeal. The Beeswing **C. A. 18**

2. —— *City of London Court — Warrant of Arrest — Service — London (City) Small Debts Extension Act*, 1852 (15 *&* 16 *Vict. c. lxxvii.*), *s.* 18—*County Courts Admiralty Jurisdiction Act*, 1868 (31 *&* 32 *Vict. c.* 71, *s.* 23.)] A warrant of arrest in an action in rem was issued from the City of London Court directed to the high bailiff, and others, the bailiffs thereof, but was, without authority from the Court, served by a clerk in the high bailiff's office:—*Held*, affirming the decision of the judge of the City of London Court, that this was not a proper service of the warrant.—*Per* Sir James Hannen: "Any officer" mentioned in 31 & 32 Vict. c. 71, s. 23, means any officer

PRACTICE—*continued.*

duly authorized by the Court.—*Per* Butt, J.: That it means any officer whose ordinary duty it is to serve processes, or one duly authorized so to do. The Palomares - - - - 36

3. —— *Co-ownership—Sale*—24 *Vict. c.* 10, *s*, 8.] The Court will not exercise the power of sale conferred on it by 24 Vict. c. 10, s. 8 (2), by ordering the sale of a ship, unless a part owner —whether he be the owner of a minority or majority of shares—makes out a very strong case. Continued and embittered disagreements between two part owners were held not to constitute sufficient reason for the interference of the Court. The Marion - - - - - 4

4. —— *Costs—Reference.*] As by Order LXV., r. 1, of the Rules of the Supreme Court, 1883, the costs of all proceedings are in the discretion of the Court, the general rule of practice in the Admiralty Court as to the costs of reference, namely, that when more than a fourth is struck off a claim, each party pays his own costs, and when more than a third the claimant pays the other party's costs, is wrong, and the Court must exercise its discretion according to the circumstances of each particular case.—*The Empress Eugénie* (Lush. 140) overruled. The Friedeberg - - **C. A. 112**

5. —— *Evidence—Admission by Master of Ship —Letter.*] A letter from the master of a ship to her owners is admissible as evidence against them in regard to the facts therein stated; but the opinion of the master in such a letter is not evidence. The Solway - - - 137

6. —— *Evidence—Engineer's Log.*] In an action of damage the engineer's log is admissible as evidence against the shipowner by whom the engineer is employed. The Earl of Dumfries [31

7. —— *Foreign Government — Counter-claim —Security for Damages*—24 *Vict. c.* 10, *s.* 34.] The Court has jurisdiction by 24 Vict. c. 10. s. 34, to order a plaintiff in an action for damage by collision to give security for damages to a defendant who brings a counter-claim. The Court can exercise this power when such plaintiff is a foreign sovereign whose ship cannot be arrested. The Newbattle - - - **C. A. 33**

8. —— *Inspection by Trinity Masters*—24 *Vict. c.* 10, *s.* 18.] Before the hearing of an action an application was made under 24 Vict. c. 10, s. 18, by the plaintiffs, that two Trinity masters should inspect the lights of the defendants' ship:—*Held*, that the application was premature and ought to be refused. The Victor Covacevich - 40

9. —— *Limitation of Liability—Foreign Ship —Crew Space — Merchant Shipping Act*, 1854 (17 *&* 18 *Vict. c.* 104), *s.* 21—*Merchant Shipping Act*, 1867 (30 *&* 31 *Vict. c.* 124), *s* 9.] The owners of a foreign ship with a closed-in space on the upper deck solely appropriated to the berthing of the crew, are entitled, in limiting their liability, to deduct such space under the Merchant Shipping Act, 1854, s. 21, sub-s. 4, though the provisions of the Merchant Shipping Act, 1867, s. 9, have not been complied with.—*The Franconia* (3 P. D. 164) explained. The Palermo 21

10. —— *Lis alibi pendens — Stay of Proceedings—Action in rem—Bail.*] The plaintiffs,

PRACTICE—*continued.*

the owners of the German vessel *J.*, commenced an action in rem against the Danish vessel *C.* in an Admiralty Court in Holland, in respect of a collision on the high seas, and the *C.* was arrested in this action. The plaintiff's agent in Holland and the Dutch Court allowed the *C.* to be released on the underwriters of the *C.* guaranteeing to the parties interested to the amount of 175,000 gulden. for the compensation which the *C.* might eventually have to pay by legal decision in Holland. While these proceedings were pending in Holland, the plaintiffs began an action in rem in England in respect of the same collision, and the *C.* was arrested in the English action. On a motion by the defendants for the release of the *C.*—the plaintiffs on such motion expressing their willingness to cease proceedings in Holland and pay the costs—Sir James Hannen held that the *C.* ought to be released, as it was primâ facie oppressive to institute an action in another Court in respect of the same subject-matter when there was no evidence that the Court, in which the action was first brought, would not do full justice to the plaintiffs:—*Held*, on appeal, by Baggallay and Fry, L.JJ., that the decision of Sir James Hannen was right, for bail being the equivalent of the ship, and it having been given in Holland, an action in England against the ship should not be allowed to proceed at the same time as the Dutch action:—*Held*, also, that if the guarantee given in Holland was not equivalent to bail, but was a private agreement, the arrest of the ship in England was against good faith:—*Held*, by Lord Esher, M.R., that the decision of Sir James Hannen was wrong, because though it was not primâ facie oppressive to institute an action in a foreign and in an English court in respect of the same collision, it would be oppressive if bail were given in both courts, but in this case the guarantee not being equivalent to bail, the plaintiffs had not so good a remedy in Holland as in England, and were therefore entitled to bring an action in the English Admiralty Court.—*McHenry* v. *Lewis* (22 Ch. D. 397) approved and applied. The Christiansborg - - - C. A. 141

11. —— *Restraint—Bail Bond—Form.*] In an action of restraint the bail bond should not be given to pay what may be adjudged against the defendant in an action, but simply for the appraised or agreed value of the plaintiff's shares, in case the ship does not return to the particular port named in the bond. The Robert Dickinson - - - - - - 15

12. —— *Salvage—Agreement—Action by Seamen.*] An agreement was made between the masters of the *W.* and the *N.*, which was in need of assistance, that the *W.* should tow the *N.* to Queenstown for the sum of 200*l.* There was no evidence at the trial to shew that the master of the *W.* consulted the officers and crew as to the terms of the agreement. The service was duly performed, and subsequently thirteen of the officers and crew of the *W.* brought an action of salvage against the *N.* The defendants pleaded, inter alia, that they had tendered 200*l.* to the owners of the *W.*, but this sum was not paid into Court:—*Held*, first, that a plea of tender without a payment into Court was bad; secondly, that the agreement must be upheld, and the 200*l.* apportioned amongst the owners and crew of the *W.*; thirdly, that when a fair salvage agreement has been made in a bonâ fide manner by the masters of the salving and the salved vessels the officers and seamen of the salving ship ought not to bring an action of salvage, and that the plaintiffs must therefore pay the costs of the action. The Nasmyth - - - - - - - 41

13. —— *Salvage—Costs—Tender—Rules of Court, 1883, Order LXV., rule 1.*] The defendant in an action for salvage, after action brought, tendered and paid into court 200*l.* in respect of the claim. The Court upheld the tender. On an application by the defendants to be allowed the whole costs of the action:—*Held*, that the discretion vested in the Court by Order LXV., rule 1, ought to be exercised in this case and in similar cases by giving plaintiffs the costs up to the date of payment into court, and defendants those subsequent to that event. But that this general rule would be departed from when salvors unreasonably refuse an offer made before suit:—*Held*, further, that an offer of a sum in respect of salvage services should not include any sum in respect of the plaintiff's costs.—*The Thracian* (3 A. & E. 504) not followed. The William Symington 1

14. —— *Warrant—Notice—Telegram.*] When the marshal sends by telegram to his substitute at an outport notice of the issue of a warrant, and such substitute communicates it to the master of the ship against which it is issued, it is a contempt of Court to move the ship from the place where it is lying. The Seraglio - - 120

15. —— *Practice—Writ in rem—Service—Action by default—Rules of the Supreme Court, 1883, Order IX., rr. 11, 12; Order XIII., rr. 12, 13, Order LXVII., r. 14.*] In an action in rem the writ of summons was served in the manner provided by Order IX., rule 12, no appearance was entered, and the action came on for judgment by default under Order XIII., rules 12, 13. The affidavit of service of the writ was made by the solicitor's clerk who had served such writ:—*Held*, that service of a writ in rem by a solicitor or his clerk, and not by the marshal or his substitute, was a valid service, and that the affidavit was sufficient. The Solis - - - 62

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SALVAGE — *Cargo — Liability of Shipowner—Agreement—Average Bond.*] The *G.* fell in with the *R.* which was in distress. The following agreement was signed by the two captains: "At my request the captain of the *G.* will tow my ship the *R.* to St. Nazaire, that being the nearest port, for repairs. The matter of compensation to be left to arbitrators at home." The *G.* towed the *R.* safely to St. Nazaire. The *R.* discharged her cargo at Dunkirk, and an average bond in the usual form was taken from the consignees of the cargo. The owners of the *G.* brought an action for salvage of the ship and freight against the *R.*, and were awarded salvage. They also brought an action in France for the salvage of the cargo against the cargo owners, but failed in it. They then brought this action in personam against the owners of the *R.* to recover salvage in respect of the services to the cargo or, in the alternative, damages from the defendants, for not taking a proper bond to secure salvage from the cargo owners:—*Held*, that the defendants were not primarily liable to pay salvage in respect of the cargo, that they had not bound themselves by the above agreement to do so, and that it was not their duty to obtain a bond from the cargo owners for the proportion of any salvage which might be due. The Raisby - - - - **114**

2. —— *Salving and saved Ships belonging to same Owners—Warranty of Seaworthiness—Bill of Lading—Exceptions—"Dangers and accidents of the seas."*] A steamship laden with cargo became disabled at sea in consequence of the breaking of her crank shaft. Such breakage was caused by a latent defect in the shaft, arising from a flaw in the welding, which it was impossible to discover. Her cargo was shipped under bills of lading which contained among the excepted perils "all and every the dangers and accidents of the seas and of navigation of whatsoever nature or kind." Another vessel belonging to the same owners towed the disabled vessel to a place of safety. In an action of salvage brought by the owners, masters, and crew of the salving vessel against the owners of cargo on the salved ship:—*Held*, that the master and crew were entitled to salvage, but that the owners were not, for that there was an implied warranty by them that the vessel was seaworthy at the beginning of the voyage:—*Held*, also, that the exceptions in the bill of lading had no application to a vessel not seaworthy at the time of sailing, and

SALVAGE—*continued.*
that the defendants were entitled to judgment on their counter-claim for the salvage awarded to the master and crew. The Glenfruin - **103**

3. —— *Ship—Arrest—Commission on Bail Bond—Damages.*] Commission on bail is not part of the defendant's costs in an action of salvage or damage, but it may be recovered as damages from the plaintiff where the arrest of the vessel is made maliciously, or with gross negligence. The Collingrove. The Numida - - - **158**
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WAGES—*Misconduct—Mortgage.*] A mortgagee took possession of a ship by putting a man on board and giving notice to the master. The latter, by order of the mortgagor, took the vessel to sea with the man in possession on board. In an action by the master for wages, and for compensation for wrongful dismissal, the registrar awarded him a sum as compensation, being the amount of wages payable for two months after the mortgagee took possession:—*Held*, on appeal, that the master had been guilty of misconduct in taking the vessel to sea, and could not as against the mortgagee be properly awarded any sum as compensation for wrongful dismissal. The Fairport - - - - - - - 13

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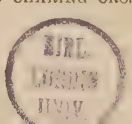

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